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No. _____

In The

Supreme Court of the United States

October Term, 1996

HOMER WOLFE,

Petitioner,

v.

DENISE DeBOSE, JOHN DeBOSE, and BEAR VALLEY CHURCH OF CHRIST, a Colorado Corporation,

Respondent.

On Petition For Writ Of Certiorari
To The Supreme Court Of The State Of Colorado

APPENDIX TO PETITION FOR WRIT OF CERTIORARI, VOLUME II, APP. 192 TO APP. 340

JAMES D. JOHNSON
Counsel of Record
HIBSCHWELLER & JOHNSON
Attorneys at Law
2696 South Colorado Blvd.
Suite 595
Denver, Colorado 80222
(303) 692-0900

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

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COURT OF APPEALS, STATE OF COLORADO

Case No. 42-CA935

NOTICE OF APPEAL ON BEHALF OF DEFENDANT-APPELLANT WOLFE

HOMER WOLFE,

Defendant-Appellant,

v.

DENISE DeBOSE and J.D.B.,

Plaintiffs-Appellees.

APPEAL FROM THE DISTRICT COURT, CITY AND COUNTY OF DENVER, STATE OF COLORADO

TRIAL JUDGE: Herbert L. Stern III, District Judge

APPELLANT (PARTY INITIATING THIS APPEAL): Homer Wolfe

TRIAL COURT CASE NO.: 91-CV-4346

COMES NOW the appellant, Homer Wolfe, by and through his attorneys, Blunk, Johnson & Johnson, and submits this Notice of Appeal pursuant to Rule 3 and 4, Colorado Appellate Rules.

NATURE OF CASE (pursuant to Rule 3(d)(2), C.A.R.):

A. Nature of Controversy

This was a tort action brought by the plaintiffs seeking damages for injuries claimed to have been sustained because of allegedly improper counseling administered to plaintiff John DeBose by defendant Homer Wolfe, and related acts or omissions by defendant Bear Valley Church of Christ, Defendant Wolfe provided pastoral counseling services to members of the Bear Valley Church of Christ congregation, including John DeBose. He counseled Mr. DeBose during 1983 and occasionally from 1985 through June of 1988. Although no complaints were raised at the time, the plaintiffs now allege that defendant Wolfe sometimes touched Mr. DeBose during counseling sessions in ways that made him feel uncomfortable. This involved Mr. Wolfe's practice of hugging counselees, to show friendship and acceptance, and massaging of counselees to relax them. There are no allegations of actual sexual activity between Homer Wolfe and John DeBose, but the plaintiffs have attempted to characterize defendant Wolfe's actions as involving sexual assault or sexual abuse.

Plaintiff Denise DeBose filed this action in the Denver District Court on her own behalf and on behalf of her son, seeking economic and non-economic damages, as well as punitive damages, from Homer Wolfe personally and from the Bear Valley Church of Christ.

All the counseling activities of defendant Wolfe involved pastoral counselling, which the defense counsel maintain should be protected by the First Amendment to

the United States Constitution. Defense counsel maintain that, under a proper reading of the Colorado Supreme Court's decision in *Destefano v. Grabrian*, 763 P.2d 275 (Colo. 1988), all the plaintiff's claims would be barred. The trial court ruled to the contrary, and allowed the case to be presented to a jury on issues of breach of fiduciary duty, outrageous conduct, and exemplary damages against both defendants, and allegations of negligent hiring and supervision against Bear Valley Church of Christ.

The jury returned verdicts in favor of both plaintiffs against both defendants. Defendant Wolfe appeals the judgments entered against him.

Counsel for this appellant note that plaintiff John DeBose was identified in the caption of the case in the trial court as "J.D.B.," because he was a minor at that time. Mr. DeBose has since turned 18, and therefore reached majority under C.R.S. §13-21-101. However, Attorney Joyce Seelen, who represents the DeBoses, has requested that we continue to refer to Mr. DeBose by his initials only in the caption of this Notice of Appeal, although she has agreed that he may be referred to my name elsewhere in this Notice of Appela (and in other appellate papers, except in the captions). Until we have a ruling from the court as to whether a litigant is entitled to this treatment once he has reached majority, we have acceded to Ms. Seelen's request.

B. Judgment Being Appealed

This appeal seeks reversal of the Judgment entered in favor of the plaintiff and against the defendants on the jury's verdicts at the conclusion of the jury trial in this

case, which started on July 13, 1992, and concluded on July 31, 1992. The order for entry of judgment was dated August 4, 1992. Post-trial motions were filed by defendant Wolfe, and the filing of those motions extended the time for filing of this Notice of Appeal, as provided in Rule 4(a), C.A.R. This appeal includes various issues already raised in post-trial motions, appealing the trial court's denial of those motions. However, in accordance with Rule 59(b), C.R.C.P., this appeal is not necessarily limited to issues raised in post-trial motions.

Jurisdiction is based on Rule 1(a)(1), C.A.R.

C. Extent of Issues Resolved by the Judgment Being Appealed

The judgment appealed is the judgment entered August 4, 1992, on the jury's verdict ["Court's Order Re: Judgment (Trial to Jury)"]. That Order provided for entry of judgment in favor of each plaintiff and against each defendant in certain amounts, and provided for "interest as allowed by law and costs to be determined," but did not set forth the amounts of interests or costs to be included in the judgment.

Secondary issues relating to interest, costs, and attorneys' fees were resolved by the "Court's Order Re: Plaintiff's Post-trial Motions" (dated October 22, 1992), the "Court's Order Re: Amended Judgment" (dated November 10, 1992), and the "Court's Order Re: Plaintiffs' Bill of Costs" (dated November 10, 1992). Issues relating to interest and costs may be raised in a separate appeal. However, as set forth below, counsel for this appellant are proceeding with the understanding that there was a final

judgment for purposes of appeal on the central judgment when the post-trial motions were denied. The trial court ruled on all post-trial motions on October 22, 1992. [See the "Court's Order re: Defendant Wolfe's Post-trial Motions," the "Court's Order Re: Defendant Bear Valley Church of Christ's Post-trial Motions," and the "Court's Order Re: Plaintiffs' Post-trial Motions," all signed October 22, 1992.]

D. Finality of Judgment Appealed

Under the holding of *Baldwin v. Bright Mortgage Company*, 757 P.2d 1072 (Colo. 1988), counsel for this appellant understand the judgment originally entered on the principal issues determined by the jury in favor of the plaintiffs to have become a final judgment for purposes of appeal on October 22, 1992, when the court denied post-trial motions. This is true even though the trial court had not yet determined entered a specific judgment on secondary issues relating to interest and costs at that time. The appeal represented by this Notice of Appeal relates to substantive issues involved in that principal judgment. The cited case does not require a Rule 54(b) certification before the principal judgment becomes final for purposes of appeal.

Under the holding of *Baldwin v. Bright Mortgage Company, supra*, counsel for this appellant understand the part of the Amended Judgment setting forth interest allowed to the plaintiff to have become a final judgment for purposes of appeal on November 10, 1992, when the "Court's Order Re: Amended Judgment" was entered,

and likewise understand the "Court's Order Re: Plaintiff's Bill of Costs" to have become a final judgment for purposes of appeal on November 10, 1992, when it was entered. A separate appeal regarding those secondary issues may be brought at a later date.

E. Date Judgment Entered

The original judgment on the jury verdicts was entered August 4, 1992. It is believed that the "Court's Order Re: Judgment (Trial by Jury)" was mailed to counsel by the court on either August 5 or 6, 1992. It was received by counsel on August 7, 1992.

The order denying defendant Wolfe's post-trial motions was entered on October 22, 1992. It is believed that the "Court's Order Re: Defendant Wolfe's Post-trial Motions" was mailed to counsel on either October 22 or 23, 1992. It was received by counsel on October 26, 1992.

F. Date of Post-trial Motions Extended Filing Deadline

Defendant Wolfe sought an enlargement of time to file post-trial motions on August 11, 1992. The court granted defendant Wolfe's request for an extension of time to file post-trial motions through September 10, 1992.

G. Date Post-Trial Motions Filed

Defendant Wolfe's post-trial motions were filed on September 10, 1992, the extended due dated.

H. Date Post-trial Motions Denied

Defendant Wolfe's post-trial motions were denied on October 22, 1992.

I. Extensions to File Notice of Appeal

No extension of time was requested to file this Notice of Appeal.

ADVISORY LISTING OF THE ISSUES TO BE RAISED ON APPEAL (pursuant to Rule 3(d)(3), C.A.R.)

Defense counsel provide the following advisory listing of issues which may be raised on appeal:

A. Whether the trial court committed reversible error in ruling that defendant Wolfe was not entitled to the protection of the First Amendment to the U.S. Constitution with respect to the claims asserted in this case, both under the "establishment" clause and the "free exercise" clause. This would include errors in ruling on pretrial motions relating to the First Amendment, in ruling during trial relating to the First Amendment (including evidentiary rulings, ruling on motions for directed verdict, and rulings on jury instructions), and rulings on post-trial motions relating to the First Amendment. (To the extent that the trial court's rulings with respect to claims against the co-defendant, Bear Valley Church of Christ, had a deleterious effect on defendant Wolfe, we may also argue the application of the First Amendment to the co-defendant. See, e.g., item L., below.)

B. Whether the trial court had subject matter jurisdiction over the claims stated in this case, given the First Amendment protection available to the defendants.

C. If there was some factual issue regarding the application of the First Amendment under the circumstances of this case, whether the trial court committed reversible error in failing to submit that factual issue to the jury for determination.

D. Whether the trial court committed reversible error in allowing the plaintiffs' claims for breach of fiduciary duty to go to the jury. Under the circumstances of this case such claims violate the First Amendment, and in allowing those claims to go forward the trial court misinterpreted the Colorado Supreme Court's decision in *Destefano v. Grabrian*, 763 P.2d 275 (Colo. 1988).

E. Whether the trial court committed reversible error in allowing the plaintiff's claims for "outrageous conduct" to go to the jury. Under this theory the jury was allowed to award damages based on laymen's perceptions of religiously motivated conduct, and to impose liability based on conduct was merely reckless (as opposed to intentional), in violation of the First Amendment. To the extent the trial court relied on the Colorado Supreme Court's decision in *Destefano v. Grabrian*, 763 P.2d 275 (Colo. 1988), to support its rulings, the trial court misinterpreted that decision.

F. Whether the plaintiffs' claims actually constituted claims for "clergy malpractice," which are barred under the Colorado Supreme Court's decision in *Destefano v. Grabrian*, 763 P.2d 275 (Colo. 1988).

G. Whether the trial court committed reversible error in its interpretation and application of the Colorado Supreme Court's holding in *Destefano v. Grabrian*, 763 P.2d 275 (Colo. 1988).

H. If the trial court correctly applied the Colorado Supreme Court's holding in *Destefano v. Grabrian*, 763 P.2d 275 (Colo. 1988), whether that holding violates the First Amendment to the United States Constitution, including the "establishment" clause and the "free exercise" clause.

I. Whether the trial court committed reversible error in allowing plaintiff Denise DeBose's claims to go to the jury. If the acts allegedly committed by defendant Wolfe were properly actionable as a breach of a fiduciary duty or as "outrageous conduct," those acts did not involve a breach of any fiduciary duty owed to plaintiff Denise DeBose or any conduct directed to her, and she would have no personal right of action based on conduct directed to plaintiff John DeBose.

J. Whether the trial court committed reversible error in submitting to the jury the claims of plaintiff Denise DeBose, in view of the statute of limitations. The claims of plaintiff Denise Debose should have been subject to a two-year statute of limitations period, as set forth in C.R.S. 13-80-102, and she failed to commence her action within two years of the date of accrual.

K. Whether the trial court committed reversible error in failing to require the plaintiffs to elect an entry of judgment on either their outrageous conduct claim or breach of fiduciary duty claim. The plaintiffs can properly pursue damages under alternative theories of recovery, but should not be permitted to have judgment

entered on two different theories under which the elements of damages recoverable are the same or substantially the same.

L. Whether the trial court committed reversible error in admitting hearsay and direct testimony regarding "other acts" allegedly committed by defendant Wolfe. If the justification for the admission of this testimony was the issue of notice to the Board of Elders of the Bear Valley Church of Christ in connection with the negligent hiring/supervision claim, then a ruling that such a claim was barred by the First Amendment would correspondingly remove the justification for admitting that testimony into evidence on that limited issue. Furthermore, because the testimony was utilized by plaintiffs' counsel in a manner contrary to the limiting instruction read to the jury, as if the testimony had been received without limitations to prove the truth of the matters asserted, the admission of this evidence even for a limited purpose was reversible error. The unfair prejudice to defendant Wolfe outweighed any possible probative value this evidence might have had, and the evidence should have been excluded entirely. This would include errors in ruling on pre-trial motions relating to this evidence, in ruling during trial, and rulings on post-trial motions.

M. Whether the trial court committed reversible error in admitting the plaintiffs' expert witnesses' characterization of defendant Wolfe's conduct as sexual assault or sexual abuse.

N. Whether the trial court committed reversible error in giving the following jury instructions, over the objections of defense counsel:

1. Instruction No. 20, regarding "looking but failing to see."

2. Instruction No. 34, regarding "outrageous conduct."

3. Instruction No. 38, regarding breach of fiduciary duty, in particular the part of the instruction allowing the jurors to award tort damages for "loss of faith" and the part of the instruction referring to defendant Wolfe's "negligence."

4. Instruction No. 40 and 47, relating to fiduciary duty, in particular the part of the instruction referring to defendant Wolfe's "negligence."

5. Instruction No. 48, the "thin skull" instruction.

Defendant Wolfe asserts that the trial court committed error in denying his Motion for New Trial with Respect to Jury Instructions, for reasons set forth in defendant Wolfe's Post-trial Motions.

O. Whether the trial court committed reversible error in refusing to give the following jury instructions tendered by defendant Wolfe:

1. Defendant Wolfe's tendered instructions Nos. 1 and 2, regarding the First Amendment.

2. Defendant Wolfe's tendered instruction No. 3 and 4, regarding the type of conduct required to establish an actionable "breach of fiduciary duty" under the circumstances of this case.

3. Defendant Wolfe's tendered instruction No. 5, which stated the "thin skull" instruction

in conjunction with the "pre-existing condition" instruction. If a "thin skull" instruction was to be given at all, it should have been given in this form.

4. Defendant Wolfe's tendered instruction No. 6, regarding the statute of limitations on plaintiff Denise Debose's claim for breach of fiduciary duty.

Defendant Wolfe asserts that the trial court committed error in denying his Motion for New Trial with Respect to Jury Instructions, for reasons set forth in his Post-trial Motions.

P. Whether the trial court committed reversible error in upholding the jury's award of future damages, when there was insufficient evidence to support that award.

Q. Whether the trial court committed reversible error in failing to order a new trial based on excessiveness of damages.

R. Whether the trial court committed reversible error in failing to declare a mistrial or requiring a new trial because of the effect of Juror Bechter's communications with other jurors. Juror Bechter's daughter was raped over twenty years ago. Juror Bechter failed to disclose this on voir dire, and was seated as a juror. She then communicated with other jurors regarding this incident. Those other jurors encouraged her to disclose this to the court, and when she did so she was removed from the jury. Defendant Wolfe asserts that Juror Bechter's communications with other jurors created a reasonable possibility of prejudice, which made it necessary to

declare a mistrial at that point. Likewise, this juror's initial concealment of this information during voir dire, by itself warranted declaration of a mistrial, since the jury had already been empaneled, and it was reversible error to try to deal with this simply by removing her from the jury and using an alternate.

S. Whether the trial court committed reversible error in failing to order a new trial based on the fact that the jury empaneled included a person ineligible to serve as a juror in the City and County of Denver, in refusing to conduct a factual hearing regarding this issue, and in depriving the defendants of the opportunity to depose Juror Lund. There was evidence that Juror Lund was a non-resident of the City and County of Denver at the time of the trial, and thus, ineligible for jury service. Defendant Wolfe contends it was error for the trial court to deny his Post-trial Motion for New Trial Regarding Juror Lund.

T. Whether the trial court committed reversible error in providing substantive responses to several questions submitted by the jury, rather than direct them to read and follow the instructions given to them. If the instructions given required amplification, then they were inadequate, and it was reversible error to submit the case to the jury on such inadequate instructions. If the instructions given required no amplification, then it was error for the court to give gratuitous addition instructions during deliberations.

TRANSCRIPTS (pursuant to Rule 3(d)(4), C.A.R.)

Transcripts of all pre-trial, trial, and post-trial proceedings will be required for this appeal. The complete transcript is expected to be between 2,000 and 3,000 pages long. The court reporter in Courtroom 2 of the Denver District Court is Deborah Stafford.

PRE-ARGUMENT CONFERENCE (pursuant to rule 3(d)(5), C.A.R.)

A pre-argument conference is not requested.

COUNSEL (pursuant to Rule 3(d)(6), C.A.R.)

Counsel for defendant-appellant Homer Wolfe:

James D. Johnson, Reg. No. 9035
Blunk, Johnson & Johnson
2696 South Colorado Boulevard, Suite 595
Denver, Colorado 80222
(303) 692-0900

Counsel for defendant Bear Valley Church of Christ:

Neil Quigley, Reg. No. 4151
Quigley & Bruce
1010 Cherry Tower
950 South Cherry Street
Denver, Colorado 80222
(303) 691-6030

(Counsel for defendant Bear Valley Church of Christ is filing a parallel Notice of Appeal.)

Counsel for the plaintiffs-appellees, Denise DeBose and J. D. B.:

Joyce Seelen, Reg. No. 9952
Holland, Seelen & Pagliuca
One Norwest Center, Suite 2530
1700 Lincoln Street
Denver, Colorado 80203
(303) 832-7700

APPENDIX (pursuant to Rule 3(d)(7), C.A.R.)

Attached hereto is an Appendix containing the following documents:

A. A copy of the "Court's Order Re: Judgment (Trial to Jury)," dated August 4, 1992.

B. A copy of Defendant Wolfe's Post-trial Motions.

C. A copy of the "Court's Order Re: Defendant Wolfe's Post-trial Motions," dated October 22, 1992.

D. A copy of Defendant Bear Valley Church of Christ, Motion for New Trial, and/or Judgment Notwithstanding the Verdict, and/or Amendment of Judgment and/or for Remittitur (incorporated by reference on page 34 of Defendant Wolfe's Post-trial Motions).

E. A copy of the "Court's Order Re: Defendant Bear Valley Church of Christ's Post-trial Motions," dated October 22, 1992.

Respectfully submitted,

BLUNK, JOHNSON & JOHNSON

By /s/ James D. Johnson
James D. Johnson, Reg. 9035
Attorneys for defendant
Homer Wolfe
2696 South Colorado Blvd.,
Ste. 595
Denver, Colorado 80222
(303) 692-0900

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing Notice of Appeal on Behalf of Defendant Homer Wolfe have been served on attorneys of record in the trial court by depositing same in the United States mail, this 4th day of December, 1992, addressed as follows:

Ms. Joyce Seelen
Holland, Seelen & Pagliuca
One Norwest Center, Suite 2530
1700 Lincoln Street
Denver, Colorado 80203

Mr. Neil Quigley
Quigley & Bruce
1010 Cherry Tower
950 South Cherry Street
Denver, Colorado 80222

I further hereby certify that copies of the foregoing Notice of Appeal on Behalf of Defendant Homer Wolfe have been hand-delivered to the Denver District Court this 4th day of December, 1992, by hand-delivering same to the Clerk of Court, Denver District Court, City and County Building, 1437 Bannock Street, Denver, Colorado 80202.

/s/ James D. Johnson

APPENDIX P

COURT OF APPEALS, STATE OF COLORADO

Case No. 92-CA-1929 (including consolidated Case No. 92-CA-1935)

AMENDED OPENING BRIEF OF APPELLANT HOMER WOLFE

BEAR VALLEY CHURCH OF CHRIST,

Defendant-Appellant,

v.

DENISE DeBOSE and J.D.B.,

Plaintiffs-Appellees,

and

HOMER WOLFE,

Defendant-Appellant,

v.

DENISE DeBOSE and J.D.B.,

Plaintiffs-Appellees.

APPEAL FROM THE DISTRICT COURT, CITY AND COUNTY OF DENVER, STATE OF COLORADO

TRIAL JUDGE: Herbert L. Stern III, District Judge

APPELLANT (Party initiating this Appeal): Homer Wolfe

TRIAL COURT CASE NO.: 91-CV-4346

Counsel for Defendant-Appellant Homer Wolfe:

James D. Johnson, Reg. No. 9035
Sheila E. Barthel, Reg. No. 21310
Blunk, Johnson & Johnson
2696 South Colorado Blvd.,
Suite 595
Denver, Colorado 80222
(303) 692-0900

IV. ARGUMENT

A. THE PLAINTIFFS' CLAIMS IN THIS CASE AMOUNTED TO CLAIMS FOR CLERGY MALPRACTICE, WHICH ARE BARRED BY THE COLORADO SUPREME COURT'S DECISION IN *DESTEFANO v. GRABRIAN*.

In *Destefano v. Grabrian*, 763 P.2d 275 (Colo.1988), the Colorado Supreme Court declined to recognize a cause of action for "clergy malpractice." In subsection III.C. of the central opinion, Justice Erickson stated as follows:

> "Since Grabrian is a Catholic priest, the malpractice claim alleged by Edna falls within the realm of 'clergy malpractice.' To date, no court has acknowledged the existence of such a tort. Since the claim for clergy malpractice is not supported by precedent and raises serious first amendment issues, we have concluded that Edna's second claim for relief was properly dismissed. We do not recognize the claim of 'clergy malpractice.' "

Id. at 285. In a concurring opinion, Justice Quinn similarly stated:

> "[R]ecognizing the so-called tort of 'clergy malpractice' would not only contravene the legislative decision to exempt religious ministers from compliance with the provisions of the statutory scheme . . . , but also would derogate the constitutionally protected interest of ministers, priests, and rabbis to conduct bona fide marriage counseling as guaranteed by the Free Exercise Clause of the First Amendment."

Id. at 289. In of the majority opinion, Justice Erickson recognized that a claim for professional negligence is a claim for malpractice, and further that "Malpractice consists of any professional misconduct, unreasonable *lack of skill* or fidelity *in* professional or *fiduciary duties*, evil practice, or illegal or immoral conduct." Id. at 285. Thus, the court said that malpractice extends to unreasonable lack of skill or fidelity in performing *fiduciary duties*. That is precisely the nature of the allegations in the First Claim for Relief in the DeBoses' Complaint against defendant Homer Wolfe. Although the claim is denominated as a claim for breach of fiduciary duty, it amounted to a claim for clergy malpractice.

It is true that the court in *Destefano v. Grabrian* did allow a claim for breach of fiduciary duty to stand against Father Grabrian. To understand the limits of that claim, however, it is necessary to focus on the facts of the case, and to recognize the way that the sections of the opinion fit together.

First, it cannot be overemphasized that Father Dennis Grabrian and the Diocese of Colorado Springs apparently made admissions from which the Supreme Court concluded that Father Grabrian's conduct fell outside the

practices and beliefs of the Roman Catholic Church, so that no First Amendment protection was available. Id. at 284. There is no comparable admission here. Quite the contrary, Homer Wolfe has consistently said that his actions were legitimate manifestations of pastoral counseling. Although there were concurrences and dissents on other issues, there was no dissent in *Destefano v. Grabrian* from the central holding that "we do not recognize the claim of 'clergy malpractice.' " Id. at 285.

In addition, it is critically important to reconcile Section III.B. in the majority opinion (allowing claims against Father Grabrian for breach of fiduciary duty and outrageous conduct) with Section III.C. (rejecting claims for clergy malpractice, including such claims styled as involving lack of skill in performing fiduciary duties). It was the extreme nature of Father Grabrian's alleged conduct which sustained the claims for breach of fiduciary duty and outrageous conduct under those circumstances.[1] By its terms, the "Grabrian" rule applies only where a clergyman engages in sexual relations with a counselee.[2]

---

[1] In subsection III.B. of the majority opinion, Justice Erickson stated that, "If the allegations are true, it is clear to us that Grabrian breached his duty and obligation when he had *sexual intercourse* with Edna." Id. at 284 [emphasis added]. In his concurring opinion, Justice Quinn stated that, "When, as here alleged, the priest abuses his position of trust *by engaging in sexual relations* with the counselee, the torts of breach of fiduciary duty and outrageous conduct are adequate to the task of providing the counselee with an effective remedy for this type of *egregious misconduct*." Id. at 289 [emphasis added].

[2] In fact, the Grabrian rule technically would seem to apply only when the clergyman's actions violate his religious vows.

Under the facts of this case, that element is conspicuously missing. Mr. Wolfe's alleged conduct is different not merely in degree, but different in *kind*, from the conduct of Father Grabrian in *Destefano v. Grabrian*. There were no allegations that Homer Wolfe engaged in sexual relations with this counselee. In fact, there are no allegations of conduct by Mr. Wolfe which would be fundamentally inconsistent with the counseling relationship. The DeBoses and their experts may be critical of the techniques employed by Wolfe in the course of pastoral counseling, but those amount to allegations of clergy malpractice. If Father Grabrian had been sued for using

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On its face, this suggests that the Grabrian rule imposes civil liability based on that violation of religious vows. Counsel for the appellant would have understood even the inquiry into the tenets of a defendant's religion to be impermissible, let alone the imposition of civil liability based on violation of those tenets. See *Presbyterian Church in U.S. v. Mary Elizabeth Blue Hull Memorial Presbyterian Church*, 393 U.S. 440, 89 S.Ct. 601, 21 L.Ed.2d 658 (1969); *Wolf v. Rose Hill Cemetery Association*, 832 P.2d 1007 (Colo.App. 1991), cert.den. (1992); and *Bernson v. Koch*, 35 Colo.App. 257, 534 P.2d 334 (1975). In the final analysis, defense counsel submit that the liability imposed on Father Grabrian must be understood *not* as liability imposed because of his violation of the religious vow of celibacy (or the vow of chastity), but on an across-the-board rule that pastoral counselors of whatever faith may not engage in sexual relations with counselees. From that perspective, it is the extreme nature of Father Grabrian's conduct, as viewed not by the standards set by the Roman Catholic Church but by the standards set by American society, which warrants imposition of liability. Taking that view, a Protestant minister, a Jewish rabbi, a Buddhist priest, or the founder of the Branch Davidian cult would all be subject to the same liability, if he engaged in that one form of extreme conduct of which society categorically disapproves.

ineffectual, improper, or even counterproductive counseling techniques, Section III.C. of the *Destefano v. Grabrian* opinion would have been controlling. Under those circumstances, there would have been no claim available for breach of fiduciary duty or outrageous conduct.[3] In this regard, the case of *Schmidt v. Bishop*, 779 F.Supp. 321 (S.D.N.Y. 1991), is instructive. There the court rejected the

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[3] It is clear that, because of the amorphous nature of the cause of action for outrageous conduct, the trial court has a much more active function in screening outrageous conduct claims than it would have in other types of cases. In *Churchey v. Adolph Coors Co.*, 759 P.2d 1336 (Colo. 1988), the Colorado Supreme Court held that it is for the court to determine, in the first instance, whether the conduct is sufficiently "extreme and outrageous" to support an outrageous conduct claim. If the conduct alleged or proven is not sufficient to create a jury question, then the outrageous conduct claim should be dismissed. This affirmed a long line of decisions to that effect by the Colorado Court of Appeals, which started with *Blackwell v. Del Bosco*, 35 Colo.App. 399, 536 P.2d 838 (1975), aff'd on other grounds, 191 Colo. 344, 558 P.2d 563 (1976). Therefore, the court is called upon to determine, in the first instance, whether the conduct alleged could create a jury question regarding outrageous conduct. When the Supreme Court ruled that Father Grabrian could be sued for outrageous conduct, it clearly was not saying that a claim for clergy malpractice could still be brought, as long as the claim masqueraded as an outrageous conduct claim. Father Grabrian's alleged conduct was obviously perceived as being so extreme as to be entirely outside the counseling relationship. Therefore, the court's ruling that an outrageous conduct claim was available against Father Grabrian must be understood to stem from the very extreme nature of his conduct, which was considered to be objectively beyond the scope of the counseling relationship. However, that does not mean that a clergy malpractice claim can survive under the guise of an outrageous conduct claim, in the absence of that extreme conduct.

effort to save what amounted to a clergy malpractice claim by sailing the claim under the flag of breach of fiduciary duty: "Schmidt's fiduciary duty claim is merely another way of alleging that the defendant grossly abused his pastoral role, that is, that he engaged in malpractice." 321 F.Supp. at 326. See, also, *Dausch v. Ryske*, 1993 WL 34873 (N.D.Ill. 1993). [This is a recent federal district court decision. A copy is attached for the court's convenient review as Appendix D.]

Before a plaintiff can *ever* have a claim for breach of fiduciary duty, there must be a fiduciary relationship, and the plaintiffs' damages must arise from a breach of a fiduciary duty associated with that relationship.[4] Therefore, to reconcile Sections III.B. and III.C. in the majority

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[4] This may indicate a flaw in the analysis of *Destefano v. Grabrian*. Because a claim for breach of fiduciary duty must be traceable to the fiduciary relationship, it is difficult to conceptualize how such a claim can be triggered by conduct outside that relationship. For example, if the fiduciary accidentally runs over his counselee, he may be liable to the counselee for negligence in the operation of his car, but that is not a manifestation of fiduciary duty. Similarly, if sexual relations between a counselor and a counselee are genuinely perceived as being entirely beyond and outside the limits of the fiduciary relationship, there may be some form of civil liability imposed (perhaps for the civil tort of battery), but not forbreach of fiduciary duty. On the other hand, if this is treated as abreach of fiduciary duty, the link to the pastoral courseling relationship actually has not been severed. The Colorado Supreme Court may yet reconsider this approach, or the U.S. Supreme Court ultimately may not accept this approach. However, the analysis in the text proceeds on the assumption that a claim for breach of fiduciary duty is available against a clergyman who engages in sexual relations with a counselee.

opinion of *Destefano v. Grabrian*, it is necessary to make some distinction as to the type of claim for breach of fiduciary duty which is barred by Section III.C. of that opinion, as a claim for clergy malpractice, and the type of claim for breach of fiduciary duty which is so extreme that it will be treated differently under Section III.B. of that opinion. The distinction must rest in the type of conduct involved. If it is necessary to produce expert testimony to establish a standard of care and to show that the defendant has deviated from that standard of care, that most definitely is an impermissible clergy malpractice claim. On the other hand, if the conduct alleged (such as having sexual relations with a counselee) is so extreme that it is objectively prohibited, then that claim may be regarded as beyond the bounds of clergy malpractice. One example of this distinction, from the area of legal malpractice, is the distinction between a claim for breach of fiduciary duty based on failure to exercise reasonable care in conducting legal research, complying with the rules of civil procedure, etc. (which would require proof of the standard of care and proof of the breach of the standard of care), as opposed to a claim for misappropriation of a client's funds (which is objectively prohibited). Both involve forms of fiduciary duty, but one is a "malpractice" claim and the other is in essence an intentional tort. Moving into the context of pastoral counseling, *Destefano v. Grabrian* held that any claim which depends on "clergy malpractice" or "negligent counseling" will not be allowed. Claims based on conduct which is objectively prohibited will be allowed, however.[5] In this case,

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[5] Another way to look at this would be to allow intentional tort claims to go forward, but not other tort claims. See *Schmidt*

the DeBoses needed voluminous standard of care evidence. [See Argument D.1., below.] These were clergy malpractice claims, regardless of the labels applied.

The importance of this threshold issue, of whether the claims against Mr. Wolfe are clergy malpractice claims, is that the Colorado Supreme Court, as the court with ultimate authority to determine the common law in Colorado, has refused to recognize a cause of action for clergy malpractice in this state. The claims against defendant Wolfe were, in reality, claims for clergy malpractice, although they were labeled as claims for breach of fiduciary duty and outrageous conduct in an effort to circumvent that central holding of *Destefano v. Grabrian*. The facts of this case simply do not parallel the facts of *Destefano v. Grabrian*, and the causes of action allowed to go forward against Father Grabrian should not be allowed to go forward against Homer Wolfe in this case.

B. ANY CLAIMS AGAINST DEFENDANT WOLFE ARISING OUT OF PASTORAL COUNSELING PROVIDED TO JOHN DEBOSE ARE BARRED BY THE FREE EXERCISE AND ESTABLISHMENT CLAUSES OF THE FIRST AMENDMENT TO THE UNITED STATES CONSTITUTION.

The religion clauses of the First Amendment to the United States Constitution proscribe "any law respecting an establishment of religion, or prohibiting the free exercise thereof." These provisions of the Bill of Rights have

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v. Bishop, supra [claim for battery, if timely filed, might properly be brought against clergymen, but not other tort claims].

been held applicable to the states under the Fourteenth Amendment. See *Cantwell v. Connecticut*, 310 U.S. 296, 60 S.Ct. 900, 84 L.Ed. 1213 (1939).[6] In *Destefano v. Grabrian*, the Colorado Supreme Court acknowledged that spiritual counseling may implicate these First Amendment rights. 763 P.2d at 283. The court recognized that, "If the alleged misconduct of Grabrian was dictated by his sincerely held religious beliefs or was consistent with the practice of his religion, we would have to resolve a difficult first amendment issue." Id. at 284. However, because there was no assertion that the conduct in question fell within the practices or beliefs of the Roman Catholic faith, and because the conduct was, in fact, admitted to be fundamentally antithetical to Catholic doctrine, the court concluded that Father Grabrian's alleged conduct was, by definition, not an expression of a sincerely held religious belief. Id. at 284. In the case now before the court, Homer Wolfe certainly does maintain that his pastoral counseling of John Debose was an expression of sincerely held religious beliefs, and the conduct alleged in this case simply cannot be equated with the conduct alleged in *Destefano v.*

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[6] Article II, Section 4, in the Constitution of the State of Colorado, contains some comparable provisions which are to some extent comparable to those of the First Amendment. It is clear that the provisions of the state constitution must be construed so as not to restrict religious freedom to an extent greater than the U.S. constitution. *Zavilla v. Masse*, 112 Colo. 183, 147 P.2d 823 (1944). Of course, the state constitution could be interpreted as providing *broader* protection for the appellants than the federal constitution. If the court finds no protection under the First Amendment, the appellants specifically request consideration of the possible impact of these parallel state constitutional provisions.

Grabrian. The claims stated against Wolfe in this case clearly were barred by the free exercise clause. Furthermore, because of the nature of the inquiries required to entertain a claim for breach of fiduciary duty or outrageous conduct based on pastoral counseling, such claims are clearly violative of the establishment clause as well. Since these two clauses are analytically distinct, they will be analyzed separately.

B.1. ANY CLAIMS AGAINST HOMER WOLFE ARISING OUT OF PASTORAL COUNSELING SUPPLIED TO JOHN DEBOSE WOULD BE BARRED BY THE FREE EXERCISE CLAUSE OF THE FIRST AMENDMENT TO THE UNITED STATES CONSTITUTION.

As recognized in *Destefano v. Grabrian*, "When the free exercise clause is raised as a defense, the threshold question is whether the conduct of the defendant is religious." Id. at 283 [citing *Wisconsin v. Yoder*, 406 U.S. 205, 92 S.Ct. 1526, 32 L.Ed.2d 15 (1972)]. If the free exercise clause is triggered, the party challenging the governmental action must then show that there is a coercive effect against his practice of religion. Id. [citing *Abington Township v. Shempp*, 374 U.S. 203, 83 S.Ct. 1560, 10 L.Ed.2d 844 (1963)]. Upon that further showing, the individual's First Amendment rights must then be balanced against the rights of society. Applying these tests, the civil claims which the trial court allowed to go forward against Homer Wolfe clearly violate the free exercise clause, and should not have been allowed.

B.1.a. The pastoral counseling administered by Homer Wolfe to John Debose was religiously motivated.

In the case now before the court, defendant Wolfe has consistently said that his pastoral counseling of John Debose was an expression of his sincerely held religious beliefs, and he has consistently invoked the First Amendment. There certainly has been no concession that his conduct in pastoral counseling is antithetical to the beliefs and doctrine of his religion. Wolfe testified that he has never tried to provide secular counseling, that his counseling has always been religiously-oriented. See Vol. 13, 11:8-15:10. (These pages are grouped in Appendix B, for the court's convenience.) In their testimony, the DeBoses' experts actually acknowledged the unique nature of pastoral counseling, because of its roots in religious beliefs and institutions. See the testimony of Reverend Marie Fortune, Vol. 11, 16:8-20, and the testimony of Randy Sims, Vol. 11, 72:14-16. These witnesses wanted to curb the use and scope of pastoral counseling because of perceived dangers associated with its spiritual underpinnings, but the fact remains that even they acknowledged those spiritual underpinnings.

One of the criticisms leveled by the plaintiffs' lay experts was that they consider it inappropriate to touch a counselee. This highlights a fundamental distinction between pastoral counseling and secular counseling. In explaining his pastoral counseling philosophies regarding hugging and massage, Mr. Wolfe stated that:

> "[Touching] is one of the best ways to communicate – of communicating your care and concern for the other person. We have been created in

the image of God. God is love, and we are made in his image. Man can't function happily, none of us can, if we do not feel loved. It's one thing to tell somebody – say, I love you; it's entirely another thing to have it demonstrated in some way, and touching has always been some way of saying, I care about you, you're important, you're somebody, you have value, and that's something everybody needs."

Vol. 13, 15:13-23. He did not intend anything sexual by this touching, however. Vol. 13, 16:8, 14:25. With respect to massage, he testified as follows:

"Q. Did you sometimes – well, I think I already established you sometimes did use massage in connection with counseling. When did you start using that practice? How did it come to your attention that it could be useful?

"A. I guess it would be as my own two sons were growing up in their preadolescent and adolescent years, that they had normal problems at that age, unable to communicate and perhaps not being able to as well as they would like; and massaging their backs and legs in order to relax them, it helped a great deal in our communication. We became very close, and we're still very close today. They grew up to be fine Christian young men.

"Q. Now, when you – after that experience in your own family, when – how did it come about that you began to use it occasionally in connection with counseling?

"A. How did it come about?

"Q. That you began to use it sometime in counseling people?

"A. Oh. Well, I find that people, were uptight and a little bit fearful of what is going on. People are, at first, in counseling somewhat fearful. It helps to relax them and helps them to communicate.

"Q. In other words, if a person in counseling seems to be having trouble telling you what's wrong or going about what's needed in order to help themselves and have you help them, you have found that on some occasions massage will cause them to relax and communicate better?

"A. Yes, sir, that's correct.

Vol. 13, 16:9-17:11.

Another criticism leveled by these lay practitioners was that the counseling technique Wolfe employed with Steven Magyar, which involved observing and praising body parts to overcome an unhealthy sense of shame, was improper. It is troubling to note that the court's rulings allowed the plaintiffs' attorney and experts to focus so much attention on this point, when there was no allegation that this technique was ever employed with John DeBose. Wolfe did explain that this technique had religious underpinning, however:

"And I was not – the techniques that I used were not 100 percent based on the Bible. What I'm trying to say is that there are biblical principles involved here concerning humanity, human sexuality, and self-image emotional problems that people have, and its rather complex.

. . . .

> "I didn't learn the principle from that, which is in Scripture. I saw that as fitting in the Scripture."

Vol. 9, 74:4-9, 74:17-18.

These lay practitioners were also critical of the counseling technique Wolfe employed with Wade Wright, which involved inspection of an adolescent counselee's circumcision, to assure him that the appearance of his male organ was not abnormal. Again, it is troubling to focus so much attention on this point, when there was no indication that this technique was ever employed with John DeBose. However, Wolfe did explain the religious underpinning of this technique. Vol. 13, 53:7-54:5.

In counseling adolescents, it is sometimes necessary to determine what is actually troubling a particular counselee, which is not always easy. Vol. 13, 18:6-12. Adolescents generally are not preoccupied by the nuances of scriptural interpretation, but about the realities of coming of age, socially, sexually, and emotionally. Mr. Wolfe's pastoral counseling was administered with a pragmatic understanding of that practical reality, but it was nevertheless pastoral counseling. Mr. Wolfe expressly stated that he was not a trained psychologist (Vol. 9, 84:5-8), although he had made an effort to familiarize himself with the literature of psychology to assist him in his role as a pastoral counselor, and that his role as a pastoral counselor was to bring individuals closer to God:

> "That was my entire basic goal, to get people back to God, in communication with him, living with him and for him; and all the counseling I did was designed to do that. And, of course, the only ways that god speaks – letting him be

> responsible, let him keep his promises, learning our – helping other people to learn how to open their hearts."

[Vol. 13, 42:21-43:2.] It is obviously true that not all the problems Mr. Wolfe confronted could be solved by quoting scripture, but pastoral counseling extends beyond that which is directly targeted at meeting spiritual needs. As recognized in Footnote 10 of *Destefano v. Grabrian*:

> "[C]ounseling by members of the clergy is frequently directed to matters that are essentially secular in nature. 'Family counseling and psychological counseling are two notable areas in which there is substantial overlap between the secular and religious aspects of a spiritual counselor's activities.' Note, *Clergy Malpractice: Taking Spiritual Counseling Conflicts Beyond Intentional Tort Analysis*, 19 Rutgers L.J. 419, 437 (1988). But see Comment, *Made Out of Whole Cloth? A Constitutional Analysis of the Clergy Malpractice Concept*, 19 Cal.W.L.Rev. 507, 516 (1983) (pastoral counseling is a religious, not secular, activity in which '[i]t is impossible to separate the 'cure of the minds' from the 'cure of the souls' '); Comment, *Clergy Malpractice; Making Clergy Accountable to a Lower Power*, 14 Pepperdine L.Rev. 137, 139 (1986) ('While some degree of overlap and similarity may exist, the religious counselor remains distinct and unique from his secular counterpart, approaching therapy from an entirely different perspective.')."

Id. at 285.

Mr. Wolfe does maintain that the pastoral counseling he administered was consistent with the tenets of the Church of Christ, and there is certainly nothing in this

case comparable to the situation presented in *Destefano v. Grabrian*, where Father Grabrian's alleged conduct was directly *contrary* to his vows. However, in the final analysis, it makes no difference whether his pastoral counseling philosophies are central to official doctrine of the Church of Christ. Established and idiosyncratic beliefs are accorded equal protection under the First Amendment. As the Supreme Court noted in *Employment Division v. Smith*, 494 U.S. 872, 110 S.Ct. 1595, 1604, 108 L.Ed.2d 876 (1990):

> "It is no more appropriate for judges to determine the 'centrality' of religious beliefs before applying a 'compelling interest' test in the free exercise field, than it would be for them to determine the 'importance' of ideas before applying the 'compelling interest' test in the free speech field. What principle of law or logic can be brought to bear to contradict a believer's assertion that a particular act is 'central' to his personal faith? Judging the centrality of different religious practices is akin to the unacceptable 'business of evaluating the relative merits of differing religious claims.' *United States v. Lee*, 455 U.S. 252 at 263 n.2, 102 S.Ct. 1051 at 1058 n.2, 87 L.Ed. 1628 (1943) (STEVENS, J., concurring). As we reaffirmed only last Term, '[i]t is not within the judicial ken to question the centrality of particular beliefs or practices to a faith, or the validity of particular litigants' interpretation of those creeds.' *Hernandez v. Commissioner*, 490 U.S. at 680, 109 S.Ct. 2136, 104 L.Ed.2d 766 (1989). Repeatedly and in many different contexts, we have warned that courts must not presume to determine the place of a particular

> belief in a religion or the plausibility of a religious claim. See, e.g., *Thomas v. Review Board, Indiana Employment Security Div.*, 450 U.S. 707 at 716, 101 S.Ct. at 1425, 67 L.Ed.2d 624 (1981); *Presbyterian Church v. Hull Church*, 393 U.S. 440 at 450, 89 S.Ct. 601 at 606-07, 21 L.Ed.2d 658; *Jones v. Wolf*, 443 U.S. 595, 602-606, 99 S.Ct. 3020, 3024-3027, 61 L.Ed.2d 775 (1979); *United States v. Ballard*, 322 U.S. 78, 85-87, 64 S.Ct. 882, 885-87, 88 L.Ed. 1148 (1944)."

Some persons hearing of Wolfe's pastoral counseling philosophies and techniques might consider them eccentric or even wrong. However, the First Amendment absolutely forbids any civil court from conducting an inquisition regarding the correctness or even the reasonableness of a defendant's sincerely held religious beliefs. As Justice Douglas stated in *United States v. Ballard, supra*:

> "Men may believe what they cannot prove. They may not be put to the proof of their religious doctrines or beliefs. Religious experiences which are as real as life to some may be incomprehensible to others.
>
> ". . . . The religious views espoused by respondents may seem incredible, if not preposterous, to most people. But if those doctrines are subject to trial before a jury charged with finding their truth or falsity, then the same can be done with the religious beliefs of any sect. When the triers of fact undertake that task, they enter a forbidden domain. The First Amendment does not select any one group or any one type of religion for preferred treatment. It puts them all in that position."

64 S.Ct. at 885-886 [citation omitted]. In that case, the defendants were charged with mail fraud, based on sale of religious materials through the mail which they represented to be divinely inspired. The defendants made representations that, because of their high spiritual attainments, Saint Germain and later Jesus himself had come down and dictated these materials to them, and that they shook hands with Jesus during his visit. The Supreme Court ruled that the defendants could be liable if they contrived this story to defraud members of the public, without believing what they said, but that the First Amendment prohibited any scrutiny of the correctness or reasonableness of the religious doctrines or beliefs themselves.

Judged by that standard, the pastoral counseling provided by Homer Wolfe to John DeBose was certainly rooted in religious beliefs, and no court may conduct an inquisition challenging the correctness or reasonableness of those beliefs.[7] The *Ballard* case does indicate that, in a

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[7] To dovetail this establishment clause analysis with the analysis of *Destefano v. Grabrian*, above, it should be noted that, where a clergyman is accused of engaging in sexual relations with a counselee, courts exhibit a strong tendency to say that such conduct by its nature falls outside the protection of the First Amendment. See *Strock v. Pressnell*, 38 Ohio St.3d 207, 527 N.E.2d 1235 (Ohio 1988), and *Milla v. Tamayo*, 232 Cal.Rptr. 685, 690, 187 Cal.App.3d 1453 (1986). The Colorado Supreme Court came close to taking that position in *Destefano v. Grabrian*, although the court technically stated only that it was not necessary to consider the ramifications of the First Amendment there was no assertion that the defendants' conduct was religiously motivated. Since there is as yet no U.S. Supreme Court decision on this point, defense counsel do not necessarily

case where the court concedes that the free exercise clause has been triggered, there can nevertheless be a factual question as to whether the defendant sincerely holds the stated religious belief. On the state of this record, there was no genuine issue as to sincerity, and this entire threshold issue should have been determined in favor of the defendant as a matter of law. However, if there was a legitimate question as to the sincerity of Mr. Wolfe's religious beliefs, that was an issue to be determined by the jury as the finder of fact, not an issue to be determined by the trial judge. Wolfe did tender appropriate instructions to submit the factual issue of sincerity of the religious belief to the jury, if the trial court concluded that there was a dispute in the evidence which made that a jury question. [Vol. 2, pp. 466-467.] However, the trial court disregarded the First Amendment entirely. The jury should at *least* have been instructed that Mr. Wolfe's actions were constitutionally protected by the free exercise clause if his religious beliefs were sincerely held.

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concede that there is a type of conduct which by its nature automatically falls outside the First Amendment. However, it clearly is not necessary to decide that hard question in *this* case, because *this* case does not involve that type of extreme facts. The conduct for which Wolfe has been liable all clearly fell within the context of pastoral counseling. There was no allegation of any sexual relations between Wolfe and John DeBose. Under these circumstances the protection of the First Amendment was certainly triggered.

B.1.b. These civil claims for breach of fiduciary duty and outrageous conduct have a chilling effect on Homer Wolfe's free exercise of his religious beliefs.

Allowing claims for breach of fiduciary duty and outrageous conduct of the type filed against Wolfe by the DeBoses would necessarily have a chilling effect on Wolfe's free exercise of his religious beliefs. The central purpose of this lawsuit is to subject Mr. Wolfe (and BVCC) to liability based on the pastoral counseling provided to John DeBose.[8] In some abstract sense, it may be

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[8] Certainly the idea behind the expert testimony presented regarding the standard of care for pastoral counseling is that, by receiving this type of evidence, a civil court can determine what is acceptable in pastoral counseling and what is not. Reverend Marie Fortune drew a boundary line which prevents any ordinary clergyman from providing "in-depth assistance to someone around issues which can be clinically diagnosed" [Vol. 11, 44:6-14], which may effectively eliminate pastoral counseling for many individuals who need it most. By that view, a member of some particular faith, who may be in dire need of counseling and may wish to seek spiritual counseling from a clergyman within his faith, must instead receive secular counseling or forego counseling altogether, because a civil court may impose liability on the clergyman for providing counseling which does not meet Reverend Fortune's standard. See *Nally v. Grace Community Church of the Valley*, 47 Cal.3d 278, 253 Cal.Rptr. 97, 763 P.2d 948 (1988), cert.den., 490 U.S. 1007, 109 S.Ct. 1644, 104 L.Ed.2d 159 (1989). Indeed, no clergyman could ever know with certainty where a retained expert might later draw the line. If there was some pastoral counseling activity Marie Fortune was not prepared to indict, then the plaintiff's attorney would simply need to find some other "expert" willing to apply even stricter standards of care to the conduct of pastoral counseling. That is already an accepted fact of life in

possible to argue that claims for compensatory damages are not primarily intended to perform a behavior-shaping function, but to compensate the plaintiff for his injuries. However, the practical reality is that exposure to liability for compensatory damages obviously has its own chilling effect on the free exercise of religion. As stated in *Schmidt v. Bishop, supra,* "Any award of damages would have a chilling effect leading indirectly to state control over the future conduct of a religious denomination. . . . " [779 F.Supp. at 332.] Furthermore, the DeBoses asked for and received punitive damages under C.R.S. § 13-21-102, the express purpose of which is not to compensate the plaintiff, but to punish the defendant *and* to deter other from similar conduct in the future. *Leidholt v. District Court,* 619 P.2d 768 (Colo. 1980); *Mince v. Butters,* 200 Colo. 501, 616 P.2d 127 (1980); *Beebe v. Pierce,* 185 Colo. 34, 521 P.2d 1263 (1974). Therefore, it is impossible to conceive of the claims brought in this case as somehow *not* having a coercive effect on the defendants' practice of their religion. Homer Wolfe happens to be the individual defendant in this particular case, but every clergyman in America is at risk if this type of claim is allowed.

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malpractice claims against secular professionals, and that is what the DeBoses are trying to import into this area which should be governed by the First Amendment.

B.1.c. These civil claims for breach of fiduciary duty and outrageous conduct are barred by the free exercise clause of the First Amendment.

Once the First Amendment is implicated, longstanding constitutional doctrine would require the demonstration of a compelling state interest to justify interference with the defendant's free exercise of his religion, and would further require that the least intrusive means be employed to protect that compelling state interest. See *McDaniel v. Paty*, 435 U.S. 618, 98 S.Ct. 1322, 55 L.Ed.2d 593 (1978); *Thomas v. Collins*, 323 U.S. 516, 65 S.Ct. 315, 89 L.Ed. 430 (1945). Applying that test, there clearly is no compelling state interest which justifies this interference with the practice of religion. With respect to the pastoral counseling he provided to John Debose, defendant Wolfe submits that *no* governmental interference can be justified in this case.

It is acknowledged that some conduct by a clergyman in the context of pastoral counseling may be considered beyond the pale. However, to the extent that there may be conduct in the context of pastoral counseling which is subject to regulation by the state, a civil cause of action which depends on a subjective standard of conduct simply cannot be considered the least intrusive means of advancing the compelling state interest. In this case, the trial court suggested the flogging of a counselee by a pastoral counselor as one example of conduct so extreme as to be subject to regulation by the state. [Vol. 6, 32:10-16.] In that hypothetical situation, the appropriate means of regulating that conduct would most likely be the enforcement of a facially neutral *criminal* statute of

general application. See *Schmidt v. Bishop, supra,* recognizing that the appropriate way of regulating conduct of a clergyman which society cannot tolerate is enforcement of criminal sanctions. In his opinion for the court in *Employment Division v. Smith, supra,* Justice Scalia recognized that the enforcement of a facially neutral criminal statute of general application does not offend the religion clauses of the First Amendment, even though the defendant maintains that his particular conduct was religiously motivated. If there is no facially neutral statute of general application which can be applied to support the prosecution of a pastoral counselor, that seems like a strong indication that the regulation of the conduct in question does not involve a compelling state interest. On the other hand, if there is a criminal statute available, that is the appropriate "least intrusive means" to vindicate the state's interest.

It is conceivable that, in a case involving harmful or offensive physical contact by a pastoral counselor with a counselee, a *civil* action for battery might be accepted as the least intrusive means of dealing with that conduct, especially if there was no criminal statute applicable under the particular circumstances. In *Schmidt v. Bishop, supra,* the court did state that "The facts alleged in the complaint support clearly an action for a battery or some similar intentional tort. . . . " 779 F.Supp. at 324. Even if John DeBose had a colorable civil claim for battery, however, opening the door to that claim would not open the door to the fiduciary duty and outrageous conduct claims actually stated in this case.

Appellant Wolfe acknowledges that, in *Employment Division v. Smith, supra,* Justice Scalia's opinion for the

court did call into question the use of the compelling state interest test in some or all cases dealing with the free exercise clause. However, the central holding necessary to decide that case was only that, where there is a facially neutral criminal statute which proscribes certain conduct, that statute may be enforced even where it is being enforced against a person who claims that his prohibited conduct was religiously motivated, and that no balancing of the rights of the individual versus the interests of the state is required in that situation. The broader language of Justice Scalia's majority opinion in *Employment Division v. Smith* may be dictum, since the result of that case is fully supported by a narrow holding that the compelling state interest test does not have to be met where the state action appears in the form of a facially neutral criminal statute which is neutrally applied. In *DeBose v. Wolfe*, we are not dealing with criminal sanctions in any way, and this interpretation of the *Smith* case would leave the compelling state interest test available in this case. Applying that balancing test, there is no compelling state interest to support imposition of liability on Mr. Wolfe, and if some compelling state interest was implicated, this type of subjective tort liability would not be the least intrusive means to vindicate that interest.

However, even if the *Smith* case is understood to entirely eviscerate the compelling state interest test in free exercise cases, it is still necessary for the court to employ *some* mechanism to determine whether the interests of the state are paramount over the First Amendment rights of the individual in any particular case. Otherwise, religious freedom under the First Amendment would be a

legal fiction. No matter what level of interest is asserted by the state, Mr. Wolfe's conduct did not rise to a level which would justify abrogation of his First Amendment right to the free exercise of religion. By condoning this witch hunt regarding methods of pastoral counseling, the trial court has directly infringed Wolfe's free exercise of religion, under circumstances where his conduct involved no criminality and no conduct involving overt sexual gratification (such as that involved in *Destefano v. Grabrian*), and which possessed no other characteristics justifying state intervention.

B.2. ANY CLAIMS AGAINST HOMER WOLFE ARISING OUT OF PASTORAL COUNSELING SUPPLIED TO JOHN DEBOSE WOULD BE BARRED BY THE ESTABLISHMENT CLAUSE OF THE FIRST AMENDMENT TO THE UNITED STATES CONSTITUTION.

The other religion clause in the First Amendment is the establishment clause. In *Engle v. Vitale*, 370 U.S. 421, 431-432, 82 S.Ct. 1261, 8 L.Ed.2d 601 (1962), Justice Black summarized the function of the establishment clause as follows:

> "Its first and most immediate purpose rested on the belief that a union of government and religion tends to destroy government and to degrade religion. . . . The Establishment Clause thus stands as an expression of principle on the part of the Founders of the Constitution that religion is too sacred, too holy, to permit its 'unhallowed perversion' by a civil magistrate."

In *Lemon v. Kurtzman*, 403 U.S. 602, 91 S.Ct. 2105, 2111, 29 L.Ed.2d 745 (1971), Justice Burger recognized that the First Amendment does not merely prohibit the establishment of a state religion, but prohibits any law "respecting an establishment of religion":

> "A law may be one 'respecting' the forbidden objective while falling short of its total realization. A law 'respecting' the proscribed result, that is, the establishment of religion, is not always easily identifiable as one violative of the Clause. A given law might not *establish* a state religion but nevertheless be one 'respecting' that end in the sense of being a step that could lead to such establishment and hence offend the First Amendment."[9]

The *Lemon* court formulated a 3-prong test to determine whether governmental interference with religious matters is constitutionally impermissible. The elements of

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[9] See, also, *Lee v. Weismann*, 112 S.Ct. 2649, 2656, 120 L.Ed.2d 467 (1992), holding that "the First Amendment's religion clauses mean that religious beliefs and religious expression are too precious either to be proscribed or prescribed by the state." Establishment clause cases most often involve affirmative governmental action which allegedly favors religion. However, by allowing the jury to impose liability on the defendants in this case, the court clearly offended the establishment clause. As the Supreme Court stated 50 years ago in *West Va. St. Bd. of Educ. v. Barnette*, 319 U.S. 624, 642, 63 S.Ct. 1178, 87 L.Ed. 1628 (1943), "If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion or other matters of opinion or force citizens to confess by word or act their faith therein."

the *Lemon* test are: (1) the law must have a secular purpose; (2) the law's principal or primary effect must be one that neither advances nor inhibits religion; and (3) the law must not foster "an excessive government entanglement with religion." In the context of pastoral counseling, any attempt to regulate the content or methodology of a religious counselor violates the *Lemon* test. See Comment, *Clergy Malpractice: Making Clergy Accountable to a Lower Power*, 14 Pepperdine L.Rev. 137 (1986). The plaintiffs' claims against Homer Wolfe fail all three prongs of the *Lemon* test, and thus, violate the establishment clause. As stated in Comment, *Made Out of Whole Cloth? A Constitutional Analysis of the Clergy Malpractice Concept* 19 Cal. W.L. Rev. 507, 530-532 (1983) (which was cited by Justice Erickson in *Destefano v. Grabrian*):

> "C. Application of the Establishment Clause Test to the Clergy Malpractice Theory
>
> "1. The Secular Purpose of a Judicial Standard of Pastoral Care is Unclear. Judicial application of a standard of care for the clergy in their pastoral counseling ministry would not stand the test of the first prong of the *Lemon* inquiry. The purpose of such a standard would appear initially to be a secular one. The state undoubtedly has an interest in enforcing standards of conduct so that wrongs may be redressed. However, the secular purpose of developing and applying a clergy malpractice standard becomes increasingly less clear when one considers the nature of pastoral counseling. The conduct to be measured in a clergy malpractice action is the application of religious ideals to the problems of life. The wrong to be redressed in such a case might best be described

as 'harm . . . on the mental and spiritual plane.' As Justice Jackson noted in his dissent in *United States v. Ballard*, these are 'precisely the thing(s) the Constitution put(s) beyond the reach' of the civil authorities. In other words, these are not matters of secular concern.

"2. The Primary Effect of a Clergy Malpractice Standard Would Not be Religiously Neutral. Applying the second prong of the *Lemon* test, it would be naive to suggest judicial application of a pastoral counseling standard of care would have a neutral effect upon religion. Without doubt, the standard would be 'a rule once laid down . . . to be followed . . . so that others now living and even those yet unborn may be affected by a decision made today.' The practical effect of such a judicial standard of conduct would be essentially similar to that of the New York statute condemned in *Kedroff* or the trial court decision reversed in *Kreshik*. It would interfere with the decisionmaking ability of a denomination's authorities and with their supervision of the sect's pastoral counselors. Development of standards or supervisory models applicable to pastoral clergy is not the role of the courts; rather, it is the role of the denominations' seminaries and training programs. Such standards must be developed within a frame-work of disciplined research and theory building, allowing innovation to add new dimensions to the process and create 'excitement, growth and learning for all involved.' Development and application of a judicial standard would hinder this innovation and restrict a sect's ability to direct and control the establishment and change of supervisory models for its clergy. Judicial enforcement of a

> standard of care also may lessen the value of pastoral counseling to those who seek it by inhibiting the intimacy on which its effectiveness depends.
>
> "3. The Clergy Malpractice Theory Will Lead to Excessive Government Involvement in Religion. The third element of examination under *Lemon v. Kurtzman* is the degree of government involvement in religious affairs. Applying this test, pastoral counseling may be analogized to other religious activities closely related to it, prayer and preaching. In two cases dealing with these activities decided prior to *Lemon*, the Supreme Court was clearly concerned with the degree of state entanglement with religion. The cases suggest regulation of prayer or preaching would be excessive involvement in religion."

With respect to secular purpose, any effort to fashion a standard to support imposition of civil liability for improper pastoral counseling by its nature crosses the line, and the effect of this undertaking can hardly be neutral. With respect to excessive entanglement, it would be hard to think of a clearer example of the manner in which imposition of civil liability results in entanglement of government in religion. The appellant notes the following examples:

1. Paragraph 5 of the Amended Complaint contained the allegation that Wolfe had neither the education nor experience nor training to be providing pastoral counseling. How can the court make any determination as to requisite expertise without excessively entangling itself in matters of religion? [On this point see the summary of standard of care evidence admitted by the court, set forth in Argument D.1., below.]

2. In interrogatories, the plaintiffs were asked to state the basis of their alleged fiduciary relationship with BVCC. They responded by citing the Old Testament (Hebrews 13:17). [Vol. 3, p. 800.] Allowing a civil suit to proceed from that premise obviously produces entanglement with religion.

3. At trial, the DeBoses were allowed to call an expert witness in the field of *theology*, Reverend Marie Fortune, upon the trial court's ruling that "she's got a level of education, training, and experience which would be of benefit to the jury in evaluating and determining the issues presented by this case." Vol. 11, 11:7-10, 13:2-7. There can hardly be a more overt indication that the court is crossing the line into matters of theology than the fact that the court regards a theologian's testimony as helpful to the jury in deciding the issues in the case.

4. It is also important to note that Reverend Fortune was not a minister of the Church of Christ, with which the Bear Valley Church of Christ was affiliated, but a minister of the United Church of Christ, a distinct denomination not affiliated with the Church of Christ or BVCC in spite of the similarity of the names. Vol. 11, 11:16-22. This placed a civil court in the position of giving an adherent of one religious denomination a platform to criticize another denomination. Reverend Fortune opined that Homer Wolfe was not qualified to provide pastoral counseling. Vol. 11, 29:13-20. She also testified that "there was no supervision of Mr. Wolfe by anyone qualified to supervise the work that he was doing." Vol. 11, 29:3-4.[10]

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[10] Bear Valley Church of Christ is represented by separate counsel, and filed a separate appeal. The two appeals have been consolidated, but the positions of the appellants are legally distinct, and they are filing separate briefs. The application of

5. Even more ironically, the trial court allowed a *lay* psychologist, Randy Sims, to testify that there was no *biblical* basis for any touching which Homer Wolfe employed in the scope of his pastoral counseling. Vol. 11, 80:6-8.

6. Aside from expert testimony in the field of theology, the court also allowed the DeBoses to call lay experts in the fields of psychiatry, psychology, and psychotherapy, all of whom were permitted to provide their lay opinions as to appropriate standards of care governing spiritual counseling provided by a clergyman. [See Argument D.1, below.] Having given his expert opinion as to the lack of a satisfactory biblical justification for Wolfe's pastoral counseling philosophies and techniques, Randy Sims, a lay psychologist, testified that under the "current law in psychological ethics" Mr. Wolfe's touching of a counselee in the context of pastoral counseling was "wrong" and "highly inadvisable." Vol. 11, 72:2-8. Even Reverend Fortune, the expert theologian, seemed inclined to apply standards of "professional ethics" to judging spiritual counseling. Vol. 11, 39:1.

7. Plaintiffs' counsel was also permitted to ask Reverend Fortune about the "spiritual impacts" she has seen "in these types of cases" [Vol. 11, 25:20-21], and Reverend Fortune responded that: "[T]here's a sense that I hear from many victims that not only was I betrayed by the church, but I was betrayed by God, and there's a profound loss that comes with it. Again, if I can't trust this person who represents God, can I trust

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the religion clauses of the First Amendment to claims against BVCC will be addressed in that appellant's brief. Nevertheless, the full extent of the entanglement produced in this case can only be appreciated by looking at all these manifestations together.

God? Is God even there for me? Because if God was there, how could this happen? There are many, many spiritual issues that people present with as a result of this experience." Vol. 11, 26:2-9. By receiving this evidence, the court was tacitly allowing the jury to award civil damages for this "spiritual impact," which should certainly be a matter of purely ecclesiastical jurisdiction. Moreover, when it came time to give instructions as to the applicable law, the trial court explicitly instructed the jury that it could award for "loss of faith."[11] Instruction No. 38, Vol. 2, p. 522.

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[11] This was the instruction regarding the damages recoverable by Denise DeBose for negligent hiring and supervision or breach of fiduciary duty. It is interesting to note that, although it was actually John DeBose who would have sustained this "spiritual impact," the court did not instruct on "loss of faith" as an element of his damages. See Instruction 39, Vol. 2, p. 523. This indicates that the trial court was making a value judgment, based on the plaintiffs' testimony, as to which of them had made a prima facie case for "spiritual injury," and that John DeBose himself did not qualify. This created a strange entanglement for a civil court in spiritual matters.

It also seems ironic that, apparently because the court perceived itself as redressing "spiritual injuries," it permitted Denise DeBose to recover non-economic damages on account of her son's purported injury. Under C.J.I. Civil Instruction 6:3, Denise DeBose should only have been allowed to recover consequential economic damages she sustained as a result of the direct injury to her son (such as treatment expenses). She should only have been allowed to recover non-economic damages (such as for her own emotional distress) if she was in the purported "zone of danger," and then only if she could show physical manifestations or mental illness resulting from the emotional distress. *Towns v. Anderson*, 579 P.2d 1163 (Colo. 1978); *Millican v. Wolfe*, 701 P.2d 107 (Colo. App. 1985), cert. dismissed 726 P.2d 647 (Colo. 1986); *James v. Harris*, 729 P.2d 986 (Colo. App. 1986); *Kimmelman v. City of Colorado Springs*, 775 P.2d 51 (Colo. App. 1988). She clearly was unable to meet those criteria.

8. In a similar vein, Reverend Fortune also analogized the "rage" sometimes experienced by persons such as the DeBoses to "the kind of anger that Jesus showed in the temple when he went there and found out that the temple was being misused." Vol. 11, 27:1-3. One useful litmus test of excessive entanglement might be that, if a claim needs to be described by biblical analogy, entanglement is occurring.

By allowing the plaintiffs' claims to go forward, the court has effectively established a short list of safe religious practices, indicating that it may punish any deviation from that list. This violates the establishment clause. This clearly created a situation where this civil court, by the experts it allowed to testify and the testimony it allowed them to give concerning appropriate standards of care for pastoral counseling was impermissibly prescribing "what shall be orthodox in . . . religion." [See *West Va. St. Bd. of Educ. v. Barnette, supra.* As the court stated in *Schmidt v. Bishop, supra* at 328:

> "This Court agrees with Nally [v. Grace Community Church of the Valley, *supra*], and regards the unconstitutionality as more than possible. It is real. . . . Any effort by this Court to instruct the trial jury as to the duty of care which a clergyman should exercise, would of necessity require the Court or jury to define and express the standard of care to be followed by other reasonable Presbyterian clergy of the community. This in turn would require the Court

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Nevertheless, it appears the trial court granted Denise DeBose a waiver from the rule generally applied in civil cases, allowing her to recover for "loss of faith" stemming from her son's alleged injuries.

> and the jury to consider the fundamental perspective and approach to counseling inherent in the beliefs and practices of that denomination. This is as unconstitutional as it is impossible. It fosters excessive entanglement with religion."

If anything, holding pastoral counselors to a secular standard, produces an even clearer constitutional violation. As stated in *Clergy Malpractice: Making Clergy Accountable to a Lower Power*, another one of the law review comments cited by Justice Erickson in *Destefano v. Grabrian*:

> "As Rabbi Ben Zion Bergman notes, '[t]he same level of competence and professional knowledge cannot be expected from the clergyman as can be expected from the psychiatrist, whose education and training is more intensively specialized.' Since the training of the clergy varies from that of licensed psychologists, so must the standard of care.
>
> "In order to determine if a psychiatrist has violated the standard of care, comparisons are made between the alleged offender and established therapists, focusing on fundamental techniques and principles. However, since members of the clergy often do not follow conventional secular counseling models or practice similar techniques, the proposed standard breaks down. The vast diversity within the religious community makes a comparison of accepted religious techniques virtually impossible, even to the point of identifying an acceptable standard. Since the fundamental concepts of the clergyman-counselor are foundationally religious in

> nature, the courts cannot scrutinize their validity without facing constitutional bars. Consequently, a secular standard cannot be imposed because of the inherent difficulty in evaluating an alleged offender's conduct using secular criteria *and* because the content and methodology are beyond the scope of judicial review."

Comment, *Clergy Malpractice: Making Clergy Accountable to a Lower Power*, 14 Pepperdine L. Rev. 137, 152 (1986).

A valid and neutral criminal law of general applicability may pass the *Lemon* test, and the same may be said of an intentional tort claim which involves an objective standard. The Missouri Supreme Court seems to have drawn the line in that manner, in the case of *Hester v. Burnett*, 723 S.W.2d 544, 554 (Mo.App. 1987), holding that intentional tort claims may be brought against a clergyman, but that other claims cannot. See, also, *Schmidt v. Bishop, supra*, 779 F.Supp. at 328 ["existing laws against battery, and the criminal statute against sexual abuse if timely invoked, provide adequate protection for society's interests"]. In this case, the significance of drawing the line so as to permit traditional intentional tort claims, which involve objective standards, while not permitting other claims, which involve subjective standards, should be obvious. If Mr. Wolfe had engaged in conduct which would constitute the tort of battery, plaintiff John DeBose might have been in a position to sue Mr. Wolfe for battery. There was no effort to make such a claim, however, indicating that the elements of battery could not be established. Instead, the DeBoses resorted to a claim for breach of fiduciary duty, applying the subjective standard of what a "reasonable pastoral counselor" would or would

not have done under the circumstances, and the even vaguer standard of the nontraditional tort of "outrageous conduct," applying the subjective standard of whether a group of lay jurors feel that the defendant's religiously motivated conduct was "outrageous." That is clearly a violation of the establishment clause of the First Amendment.

Respectfully submitted,

BLUNK, JOHNSON & JOHNSON

By _____

James D. Johnson, Reg.No. 9035
Sheila E. Barthel, Reg. No. 21310
Attorneys for Appellant Homer Wolfe
2696 South Colorado Blvd.
Suite 595
Denver, Colorado 80222
(303) 692-0900

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing Amended Opening Brief of Appellant Homer Wolfe have been served on counsel of record this 6th day of May, 1993, by hand-delivering same to the following offices:

Holland, Seelen & Pagliuca
One Norwest Center, Suite 2530
1700 Lincoln Street
Denver, Colorado 80203

Quigley & Bruce
1010 Cherry Tower
950 South Cherry Street
Denver, Colorado 80222

APPENDIX Q

COURT OF APPEALS, STATE OF COLORADO

Case No. 92-CA-1929 (including consolidated Case No. 92-CA-1935)

APPELLANT WOLFE'S CITATION OF SUPPLEMENTAL AUTHORITY

BEAR VALLEY CHURCH OF CHRIST,

Defendant-Appellant,

v.

DENISE DeBOSE and J.D.B.,

Plaintiffs-Appellees

and

HOMER WOLFE,

Defendant-Appellant,

v.

DENISE DeBOSE and J.D.B.,

Plaintiffs-Appellees.

COMES NOW appellant Homer Wolfe, by and through his attorneys, Blunk, Johnson & Johnson, and submits this Citation of Supplemental Authority, with respect to his appeal in this case.

Defense counsel hereby cite to the court the Religious Freedom Restoration Act of 1993, 42 U.S.C. §2000bb, 107 Stat 1488, P.L. 103-141 (HR 1308), approved November 16, 1993. A copy of this statute, obtained through WESTLAW, is attached hereto.

The Religious Freedom Restoration Act of 1993 repudiates and legislatively overturns the U.S. Supreme Court's holding in *Employment Division v. Smith,* 494 U.S. 872, 110 S.Ct. 1595, 1604, 108 L.Ed.2d 876 (1990). The statute restores the "compelling state interest" test in cases involving the free exercise clause of the First Amendment, as previously set forth in *Sherbert v. Verner,* 374 U.S. 398, 83 S.Ct. 1790, 10 L.Ed2d 965, (1963), and *Wisconsin v. Yoder,* 406 U.S. 205, 92 S.Ct. 1526, 32 L.Ed.2d 15 (1972), even where the law undergoing constitutional scrutiny may be a neutral law of general applicability. By its terms, the Act applies to all federal and state law, whether statutory or otherwise, and to the implementation of that law, and the Act specifically applies whether the law in question was adopted before or after the enactment of the Religious Freedom Restoration Act of 1993. See 42 U.S.C. §2000bb-3 (a).

Defense counsel just became aware of the passage of the Religious Freedom Restoration Act of 1993 on Friday, January 28, 1994. Defense counsel question whether this Act would affect the analysis of First Amendment issues in the *DeBose v. Wolfe* appeal. The actual holding of *Employment Division v. Smith* was only that the "compelling state interest" test need not be followed where the impingement on free exercise of religion involves a facially neutral criminal statute of general applicability. In this case, we are not dealing with a criminal enactment of any kind, nor are the fiduciary duty and outrageous conduct claims against Mr. Wolfe facially neutral laws of general applicability, since their application to Mr. Wolfe depends on his status as a minister and the religious context in which pastoral counseling occurred. Therefore,

even under *Employment Division v. Smith*, the compelling state interest test might still apply to this case. If there is any question as to the applicability of the compelling state interest test, however, such questions should be put to rest by the Religious Freedom Restoration Act of 1993.

Respectfully submitted,

BLUNK, JOHNSON & JOHNSON

By /s/ _____
James D. Johnson,
Reg. No. 9035
Attorneys for appellant
Homer Wolfe
2696 South Colorado Blvd., Suite 595
Denver, Colorado 80222
(303) 692-0900

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing Appellant Wolfe's Citation of Supplemental Authority have been served on counsel of record by faxing same to the offices of Holland, Seelen & Pagliuca (832-2127) and Quigley & Bruce (691-9025) at 11:45 a.m. on Monday, January 31, 1994, and also by hand-delivering hard copies of same to counsel appearing for oral argument on the afternoon of January 31, 1994.

APPENDIX R

COURT OF APPEALS, STATE OF COLORADO

Case No. 92-CA-1929 (including consolidated Case No. 92-CA-1935)

PETITION FOR REHEARING

BEAR VALLEY CHURCH OF CHRIST,

Defendant-Appellant,

v.

DENISE DeBOSE AND J.D.B.,

Plaintiffs-Appellees,

and

HOMER WOLFE,

Defendant-Appellant,

v.

DENISE DeBOSE AND J.D.B.,

Plaintiffs-Appellees.

APPEAL FROM THE DISTRICT COURT, CITY AND COUNTY OF DENVER, STATE OF COLORADO

TRIAL JUDGE: Herbert L. Stern, III, District Judge

APPELLATE JUDGE WHO AUTHORED THE OPINION OF THE COLORADO COURT OF APPEALS: John A. Criswell, Appellate Judge

OTHER JUDGES WHO PARTICIPATED IN THE APPELLATE RULING: Daniel M. Taubman, Appellate Judge (Specially Concurring)
Janice B. Davidson, Appellate Judge (Dissenting)

COMES NOW defendant-appellant Homer Wolfe, by and through his attorneys, Hibschweiler & Johnson, and submits the following Petition for Rehearing, pursuant to Rule 40 of the Colorado Appellate Rules.

ISSUES PRESENTED FOR REVIEW

The majority opinion largely accepted defense counsel's arguments A and C, that whatever claims may be recognized by *Destefano v. Grabrian*, 763 P.2d 275 (Colo. 1988), and *Moses v. Diocese*, 863 P.2d 310 (Colo. 1993), cannot depend on breach of a standard of care for pastoral counseling, and that expert testimony cannot be received to define a standard of care or establish a breach thereof. The majority also agreed with argument B, to the extent of ruling that it was necessary to instruct the jury in this case regarding the significance under the First Amendment of a determination that the practices involved were religiously motivated, and to instruct the jury that the sincerity of the defendant's religious beliefs was a question for the jury to decide. However, the court did not accept the argument that the plaintiffs' claims should be categorically barred by the First Amendment, citing *Destefano* and *Moses*. The majority also accepted

argument E. to the extent of ruling that the manner in which the jury was instructed resulted in duplication of damages, although the court did not reach the larger question of whether, duplication of damages aside, the damages awarded were excessive. The court rejected defense counsel's argument D, that the trial court committed error in admitting other acts evidence at trial.

To preserve the option to apply for certiorari to the Colorado Supreme Court on the issues on which the Court of Appeals ruled unfavorably or on which the Court of Appeals did not rule, appellant Wolfe requests rehearing on the following issues:

(1) Whether the plaintiffs' claims against Homer Wolfe are categorically barred by the First Amendment to the Untied States Constitution;

(2) Whether the trial court committed reversible error in admitting other acts evidence; and

(3) Whether, aside from the issue of duplication of damages, the damages awarded to the plaintiffs were excessive.

ARGUMENT

1. Whether the Plaintiffs' Claims Against Homer Wolfe are Categorically Barred by the First Amendment to the United States Constitution

In *Destefano v. Grabrian* and *Moses v. Diocese of Colorado, supra,* the individual defendants did *not* assert that their conduct toward the plaintiff was religiously motivated or the result of a sincerely held religious belief.

Therefore, the Free Exercise Clause was not implicated when the Supreme Court evaluated those plaintiffs' claims for outrageous conduct and breach of fiduciary duty.

However, in this case, Mr. Wolfe has affirmatively stated that his pastoral counseling of plaintiff John DeBose *was* an expression of his sincerely held religious beliefs, which triggers the application of the Free Exercise Clause. Defense counsel have consistently invoked the First Amendment, contending that, once the Free Exercise Clause is implicated, the compelling state interest test is applicable, and that these claims do not hold up under that test. Where the First Amendment is implicated, claims for outrageous conduct and breach of fiduciary duty by nature allow a civil jury to pass judgment on religious beliefs and practices, applying their perceptions as to secular society's benchmark of acceptable conduct. The majority has recognized that it was reversible error to allow experts to opine about whether Mr. Wolfe's beliefs and conduct met secular and religious (even Biblical) standards. Even without that testimony, however, allowing these types of claims to go forward necessarily has an impermissible chilling effect on Mr. Wolfe's free exercise of his religious beliefs. Even if the court found a compelling state interest in allowing these claims to go forward, they should not pass constitutional muster as the least intrusive means.

Likewise, adjudication of these civil tort claims results in excessive government entanglement in religion, which offends the establishment clause. Permitting these claims to go forward is precisely the kind of government interference which is constitutionally impermissible

under *Lemon v. Kurtzman*, 403 U.S. 602, 91 S.Ct. 2105, 2111, 29 L.Ed. 2d 745 (1971).

Therefore, the plaintiffs' civil claims should be barred categorically by the First Amendment. A facially neutral law of general applicability, such as a criminal assault or battery statute, which would be triggered by objective conduct, without consideration of subjective standards, might withstand constitutional scrutiny. Claims for outrageous conduct and breach of fiduciary duty by their nature involve subjective standards, however.

2. Whether the Trial Court Committed Reversible Error in Admitting Other Acts Evidence.

To give meaning to the *Spoto* test[1] and avoid the serious danger that the jury will consider the other acts evidence improperly, it is essential that the *Spoto* test be meaningfully applied by the trial court. This means that the proponent of other acts evidence should be required to articulate exactly how the evidence satisfies each element of the *Spoto* test, including articulation of precisely what Rule 404 exception is applicable, and exactly why. If the trial court admits the other acts evidence based simply on a conclusory recitation of the litany of possible exceptions under Rule 404, the *Spoto* test, and any limiting instruction are rendered worthless. The resultant harm cannot be cured by an appellate court's after-the-

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[1] The 4-prong test for the admission of other acts evidence was fashioned by the Colorado Supreme Court in *People v. Spoto*, 795 P.2d 1314 (1990).

fact application of the *Spoto* test, because, to have meaning, a limiting instruction obviously must be given to the jury during trial. Defense counsel respectfully submit that the trial court committed reversible error by admitting some or all of the other acts evidence contrary to the *Spoto* test.[2] However, even if the appellate court finds applicable one of the exceptions in the litany recited by plaintiffs' counsel and the trial court, there would still be reversible error since the *jury* was not properly instructed as to exactly what limited purpose the evidence could properly serve. *See* Judge Briggs' dissent in *People v. McKibben*, 862 P.2d 991 (Colo.App. 1993), cert.den. (1993).[3]

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[2] We note that Section II.C. of the majority opinion recognized that certain expert testimony was inadmissible, in part, because it related to dissimilar acts involving counselees other than the minor plaintiff: "[A] portion of this testimony was irrelevant. For example, there was no evidence that Wolfe asked the minor to compare his genitals to photographs in any book. Hence, the 'appropriateness' of any such conduct was not relevant to any portion of the minor's claim. At best, it related to incidents allegedly occurring during sessions with other counselees." By extension, *at least* that particular other acts evidence should have been excluded.

[3] One of the cases cited by Judge Briggs was *State v. Saltarelli*, 98 Wash.2d 358, 655 P.2d 697, 700 (Wash. 1982). In that case, the Washington court noted that earlier cases "lack any analysis of the issue and do little more than pay lip service to the great potential for prejudice inherent in evidence of prior sexual offenses. They have been criticized as using motive and intent as 'magic passwords whose mere incantation will open wide the courtroom doors to whatever evidence may be offered in their names.' " *See*, also Slough & Knightly, "Other vices, Other Crimes," 41 *Iowa Rev.*, 325, 334 (1956) ("When deciding the issue of guilt or innocence in sex cases, where prejudice has

3. Whether, Aside From the Issue of Duplicative Damages, the Damages Awarded to the Plaintiffs Were Excessive.

The majority opinion held that, because the jury was permitted to award damages on separate verdict forms for the same injury, there was duplication of damages. Defense counsel contend that the damages award was excessive, regardless of whether the verdict forms resulted in duplication of damages. Defense counsel agree that the verdict forms were improper, and that duplicative damages were awarded. Compensatory damages totalling $292,472.52 were not supported by the evidence. That may held to explain the excessive amount of damages, but the fact is that the damages were excessive, whether because of duplication or otherwise.

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reached its loftiest peak, our courts have been most liberal in announcing and fostering a nebulous exception, offering scant attention to the inherent possibilities of prejudice. Just when protection is most needed, the rules collapse.").

CONCLUSION

Therefore, defendant-appellant Wolfe respectfully requests a rehearing on these issues as to which the Court of Appeals ruled adversely or made no ruling.

Respectfully submitted,

HIBSCHWEILER & JOHNSON

By /s/ James D. Johnson
James D. Johnson, Reg. 9035
Sheila E. Barthel, Reg. 21310
Attorneys for defendant-
appellant Homer Wolfe
2696 south Colorado Blvd.,
Suite 595
(303) 692-0900

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing Petition for Rehearing have been served on counsel of record this 1st day of December, 1994, by placing same in the United States mail, postage prepaid, addressed as follows:

Ms. Joyce Seelen
Holland, Seelen & Pagliuca
One Norwest Center, Suite 2530
Denver, Colorado 80203

Mr. Neil Quigley
Quigley & Bruce
1010 Cherry Tower
950 South Cherry Street
Denver, Colorado 80222

/s/ Illegible

APPENDIX S

SUPREME COURT, STATE OF COLORADO

Case No. _____

PETITION FOR WRIT OF CERTIORARI ON BEHALF OF PETITIONER HOMER WOLFE

HOMER WOLFE,

Petitioner,

v.

DENISE DeBOSE AND J.D.B.,

Respondents.

APPEAL FROM THE DISTRICT COURT, CITY AND COUNTY OF DENVER, STATE OF COLORADO

TRIAL JUDGE: Herbert L. Stern, III, District Judge

COLORADO COURT OF APPEALS, Case No. 92-CA-1929 (including consolidated Case No. 92-CA-1935)

APPELLATE OPINION BY JUDGE CRISWELL
JUDGE TAUBMAN SPECIALLY CONCURS,
JUDGE DAVIDSON DISSENTS

COMES NOW petitioner Homer Wolfe, by and through his attorneys, Hibschweiler & Johnson, and submits the following Petition for Writ of Certiorari, pursuant to Rule 51 of the Colorado Appellate Rules:

I. ADVISORY LISTING OF ISSUES PRESENTED FOR REVIEW

1. Whether the fiduciary duty and outrageous conduct claims are categorically barred by the First Amendment to the United States Constitution; and

2. Whether the trial court committed reversible error in admitting other acts evidence.

II. DECISION AS TO WHICH REVIEW IS SOUGHT

By opinion dated November 17, 1994, the Court of Appeals reversed the judgments entered in favor of the plaintiffs in th[e] trial court, and remanded the case to the trial court for a new trial. A copy of that decision is attached hereto, as Appendix A. In general, petitioner Wolfe accepts the Court of Appeals' decision, except for the two points noted in the advisory listing.

Counsel for Homer Wolfe filed a Petition for Rehearing on limited issues. That Petition was denied on January 5, 1995, with a stay of mandate to and including February 6, 1995. A copy of that Order is attached hereto, marked as Appendix B.

III. GROUNDS UPON WHICH JURISDICTION IS INVOKED

Depending on the interpretation which is given to earlier Colorado appellate cases, petitioner Homer Wolfe submits that the Court of Appeals has either (1) determined a question not previously determined by Colorado Supreme Court, (2) decided a question of substance in a way probably not in accord with applicable decisions of

the Colorado Supreme Court, and/or (3) rendered a decision in conflict with the religion clauses of the First Amendment to the United States Constitution.

IV. STATEMENT OF THE CASE

Petitioner Homer Wolfe was a minister in the Church of Christ, employed at the Bear Valley Church of Christ. As part of his ministry, he provided pastoral counseling, and one of his counselees was plaintiff John DeBose. In the context of pastoral counseling, Mr. Wolfe sometimes used a massage technique with counselees to relax them and to facilitate their connection with God. Although Mr. Wolfe does not recall ever massaging John DeBose, the plaintiffs have alleged that massage occurred, and they have brought claims for breach of fiduciary duty and outrageous conduct against Mr. Wolfe based on that conduct. The trial court allowed those claims to go forward over objection, and entered judgment on jury verdicts for the plaintiffs. Counsel for defendant contend that these subjective claims are categorically barred by the religion clauses of the First Amendment, and that, if they are not categorically barred, such claims would at least be barred by the free exercise clause upon a showing as to the sincerity of the defendant's religious beliefs. The Court of Appeals accepted the narrower second argument, but held that the broader first argument had already been adversely determined by this court in *Destefano v. Grabrian*, 763 P.2d 275 (Colo. 1988), and *Moses v. Diocese*, 863 P.2d 310 (Colo. 1993), U.S. cert.den. (1994). (See Subsection I.B., at 18 Brief Times Reporter 1939.)

The trial court also allowed presentation of evidence as to other acts involving counselees other than John DeBose, without requiring plaintiffs' counsel to meet the requirements of *People v. Spoto*, 795 P.2d 1314 (Colo. 1990). The trial court admitted this evidence as to a litany of exceptions (motive, plan, intent, accident, or mistake), without *Spoto* findings as to any exception, and the Court of Appeals has affirmed that result with a cursory after-the-fact rationalization. Defense counsel also contend that this treatment constitutes reversible error under *Spoto*.

V. ARGUMENT

1. Whether the fiduciary duty and outrageous conduct claims are categorically barred by the First Amendment to the United States Constitution.

The Colorado Supreme Court has previously decided two cases involving claims against clergymen and/or religious institutions, *Destefano v. Grabrian* and *Moses v. Diocese, supra*. The case of *DeBose v. Wolfe* differs fundamentally from those earlier cases in at least two respects.

First, *DeBose v. Wolfe* is the first case in which counsel representing the individual clergyman have made the effort to invoke the First Amendment in this court.[1]

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[1] In *Destefano v. Grabrian*, Justice Erickson noted:

"If the alleged conduct of Grabrian was dictated by his sincerely held religious beliefs or was consistent with the practice of his religion, we would have to resolve a difficult first amendment issue. This, however, is not the case. It has not been asserted that

Secondly, in *DeBose v. Wolfe*, the clergyman's alleged conduct is fundamentally different from the conduct acknowledged by the clergymen in *Destefano* and *Moses*. In those earlier cases, there was no question that Father Grabrian and Father Robinson carried on sexual affairs with the counselees/plaintiffs. They did not assert that their conduct was religiously motivated, so as to fall within the purview of the First Amendment. Therefore, both the *Destefano* and *Moses* courts assumed that the conduct of Father Grabrian and Father Robinson did not present any First Amendment issues. However, in *DeBose v. Wolfe*, there is no evidence that defendant Wolfe had any type of sexual affair with John DeBose, nor even any evidence that he engaged in sexually motivated conduct while providing pastoral counseling to him. Mr. Wolfe has acknowledged that he sometimes employed massage in pastoral counseling, to relax the counselee and to help bring him into contact with God.[2] However, this conduct

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Grabrian's conduct falls within the practices or beliefs of the Catholic church."

763 P.2d at 284. The appeal in *Moses v. Diocese* did not even include an appeal by the clergyman, because claims against the clergyman did not go to trial along with the claims against the Diocese and Bishop Frye. Therefore, *DeBose v. Wolfe* is the first case in which defense counsel have briefed the issue of whether Mr. Wolfe's "status liability," based on his status as a clergyman, is subject to First Amendment limitations.

[2] Although Mr. Wolfe does not recall that he ever employed this technique with John DeBose, the plaintiffs have alleged that massage did occur. Plaintiffs' counsel has characterized this alleged massage as "fondling" to imply that it was sexually motivated, but the testimony of John DeBose himself does not support this characterization. The full extent of John DeBose's testimony was that Mr. Wolfe massaged his shoulders and

was motivated by Mr. Wolfe's religious beliefs and his sincere effort to facilitate the counselee's spiritual connection.

In a case such as this one, where the defendant clergyman asserts conduct motivated by religious beliefs, the Court of Appeals recognized that the clergyman is afforded limited First Amendment protection, holding that the jury should have received an instruction that, if the clergyman's religious beliefs were "sincerely held," he could not be held liable. As far as that holding of the Court of Appeals goes, we believe that is a correct application of the law to the circumstances of this case. However, we submit that even broader First Amendment issues are presented, because the causes of action for breach of fiduciary duty and outrageous conduct, which were held to pass constitutional muster in *Destefano v. Grabrian* and *Moses v. Diocese*, actually do not satisfy the First Amendment.

Fiduciary law, and the duties owed by an authentic fiduciary to his beneficiary, originated in situations where the defendant exercised control over the plaintiff's financial affairs, because of which the defendant was charged with an enhanced degree of responsibility based on that

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thighs in the course of pastoral counseling and that, on one occasion, when Mr. DeBose was wearing shorts, while Mr. Wolfe was massaging John DeBose's thigh, there was inadvertent contact between Mr. Wolfe's hand and John DeBose's genitals. The record was analyzed in detail in appellant Wolfe's Reply Brief in the Court of Appeals, to dispel any notion that somewhere in the record there might actually be evidence of "fondling." Space does not permit a reiteration of that analysis here. However, see pages 11-18 in the Reply Brief.

undertaking. See N. Schaumann, *The Lender and the Unconventional Fiduciary*, 23 Seton Hall L. Rev. 21 (1992). Until *Destefano v. Grabrian* was decided, all the Colorado cases involving breach of fiduciary duty concerned some situation in which the defendant allegedly failed to exercise appropriate care when he managed the plaintiff's financial affairs.[3] Except for *Destefano v. Grabrian* and *Moses v. Diocese*, all the later Colorado appellate decisions relating to breach of fiduciary duty likewise involve that element of control of the plaintiff's financial affairs.[4]

As applied to claims against clergymen and religious institutions, however, a claim for breach of fiduciary duty

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[3] In *Destefano*, the "repose of trust" concept was lifted from the definition of the term "fiduciary relationship" set forth in Instruction 31:16, C.J.I. Civil 2d. That instruction was housed in the "Wills" chapter, and the heightened standard of care ("a duty to deal with those interests with utmost good faith and solely for the benefit of the other") was clearly tied to the "fiduciary's" status as a guardian, trustee, executor, agent, etc., such that he had control over the beneficiary's financial affairs. That qualifier was lost when a fragment of the definition was lifted out of context and given effect in isolation. All the cases cited in The Source and Authority to Instruction 31:16 pertained to a fiduciary with control over the financial affairs of the beneficiary.

[4] The Supreme Court's Committee on Civil Jury Instructions has taken this court at its word that the claim for breach of fiduciary duty has been released from its financial moorings, creating an entirely new chapter (Chapter 26, C.J.I. Civil 3d) which defines a freestanding cause of action for breach of fiduciary duty anytime there is a repose of trust by one person in another. However, with the exception of the *Destefano* and *Moses* decisions, all of the cases now annotated in the Source and Authority of Instruction 26:2 involve a "fiduciary" who exercised some control over the plaintiff's *financial* affairs.

takes on an entirely new and unprecedented aspect. The "fiduciary relationship" no longer necessarily involves an exercise of control over the plaintiff's financial affairs, but rather, it may arise solely upon the plaintiff's repose of trust in the defendant, when the defendant accepts that repose of trust. The subject of the fiduciary duty is no longer financial matters, where the heightened standard of care has logical application, but rather, every matter over which the "fiduciary" conceivably may exercise any control or influence. The question of whether there existed a fiduciary relationship between a clergymen or religious organization and a congregant is a factual issue for the jury to decide, along with the issue of the dimensions of the fiduciary duties associated with that fiduciary relationship, and the question of whether there was a breach of the fiduciary duties. By its nature, this cause of action violates the establishment clause of the First Amendment, because the jury would be called upon to invent and impose a standard of care regulating religious activity.[5]

The test for determining whether state action violates the establishment clause appears in *Lemon v. Kurtzman*, 403 U.S. 602, 91 S.Ct. 2105, 29 L.Ed. 745 (1971). In the third prong of the *Lemon* test, the U.S. Supreme Court

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[5] "Second, in analyzing and defining the scope of a fiduciary duty owed persons by their clergy, the Court would be confronted by the same constitutional difficulties encountered in articulating the generalized standard of care for a clergyman required by the law of negligence." *Schmidt v. Bishop*, 779 F.Supp. 321, 326 (S.D.N.Y. 1991) (Summary judgment upheld in favor of defendant on plaintiff's breach of fiduciary duty claim.) See also *Schieffer v. Catholic Archdiocese of Omaha*, 244 Neb. 715, 508 N.W.2d 907 (Neb. 1993).

forbade state action which would "foster excessive entanglement with religion." Allowing a breach of fiduciary duty claim to go forward against a clergyman, based on his *status* as a clergyman, produces excessive entanglement, because secular civil authority (the judge and jury in the first instance, and ultimately, the appellate courts) is regulating religious conduct by applying highly subjective standards for breach of fiduciary duty.

Even in cases involving conduct which society may unequivocally condemn (such as the actions of Father Grabrian and Father Robinson in *Destefano* and *Moses*), a claim for breach of fiduciary duty cannot pass constitutional muster, because by its nature the claim gives rise to excessive government entanglement with religion. See *Barquin v. Roman Catholic Diocese*, 839 F.Supp. 275 (D.Vt. 1993). The imposition of criminal liability, which by its nature would involve the application of *objective* criteria not dependent on the clergyman's status as a minister, may avoid the excessive entanglement barred by *Lemon*, and a civil claim for assault and battery might also pass constitutional muster. *Schmidt v. Bishop*, *supra*, 779 F.Supp. at 328. However, breach of fiduciary duty does not.

Likewise, a claim for outrageous conduct gives the jury almost total discretion, and the circumstance which is identified as rendering the conduct "outrageous" is precisely the defendant's status as a clergyman. Secular civil authority is placed in the position of exercising judgment as to what clerical and religious conduct is considered "outrageous," based on subjective perceptions of the proper conduct of clergymen and religious institutions. Again, assuming that some form of government

action in this area could occur without excessive entanglement, that could not be a claim for outrageous conduct.

The foregoing legal analysis has focused on the establishment clause of the First Amendment. The other religion clause is the free exercise clause. As Judge Criswell noted in his majority opinion in the Court of Appeals decision in *DeBose v. Wolfe*, the free exercise clause may be applicable only where there is a basis for arguing that the conduct in question was the product of a religious belief, which may create a factual issue of sincerity to be decided by the jury. In cases such as *Destefano* and *Moses*, where the individual clergymen were indisputably engaging in sexual relations, there may be no basis for associating that conduct with any sincerely held religious belief. However, in *DeBose v. Wolfe*, the free exercise clause is implicated, because Homer Wolfe has asserted that he engaged in religiously motivated conduct during pastoral counseling.

Free exercise analysis depends on the "compelling state interest" test, which permits government action only when it has a compelling interest in regulating the activity, which outweighs the individual's interest, and then only government action by the least intrusive means.[6] In

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[6] *Church of the Lukumi Babaluaye, Inc. v. City of Hialeah*, 113 S.Ct. 2217, 124 L.Ed.2d 472 (1993). There was concern that *Employment Division v. Smith*, 494 U.S. 872, 110 S.Ct. 1595, 108 L.Ed.2d 876 (1990), might signal an abandonment of the compelling state interest test, and that concern prompted Congress to pass the Religious Freedom Restoration Act of 1993, 42 U.S.C. § 2000bb, which legislatively mandated the

DeBose v. Wolfe, a compelling state interest has not been demonstrated. However, even assuming for the sake of argument that a compelling state interest may exist, *and* that the balancing component supports some government action, it is apparent that subjective liability for breach of fiduciary duty and outrageous conduct cannot qualify as the least restrictive means of regulating conduct in pastoral counseling.[7] The plaintiffs and their attorneys are critical of Mr. Wolfe's pastoral counseling methods, but their subjective claims based on his religious conduct amount to nothing more than "clergy malpractice" (which was barred in *Destefano v. Grabrian*) because they are based on his *status* as a minister and they require inquisition into the appropriateness of Mr. Wolfe's counseling methods.[8] *Schmidt v. Bishop* is instructive on this point:

"compelling state interest" test in free exercise cases. In any event, later cases affirmed the compelling state interest test even before the statute was adopted. See, e.g., *Lukumi Babaluaye, supra*.

[7] The least restrictive means of regulating "unacceptable" conduct of this type would be to allow a criminal charge or a tort claim based on a neutral law of general applicability, such as assault or battery, to go forward. See *Schmidt v. Bishop*, 779 F.Supp. at 328.

[8] In *Destefano*, the court held that a claim for "clergy malpractice" is not actionable in Colorado (Section III.C. of the opinion), although a claim for breach of fiduciary duty could go forward (Section III.B.). Section III.C. recognized that the foreclosed "clergy malpractice" theory would include "unreasonable lack of skill or fidelity in professional or fiduciary duties," whereas Section III.B. allowed a claim based on a "fiduciary duty." Our best effort to reconcile these parts of the opinion has been to read Section III.C. as foreclosing any claim which depends on a subjective analysis, while reading Section III.B. as allowing only fiduciary duty claims which

> "Plaintiff has deliberately avoided asserting that the case involves clergy malpractice, but rather styles this claim artfully as one for malpractice by a 'youth worker and counselor'. . . . It is a fact conceded in the complaint that plaintiff's parents brought her to defendant Bishop because he was their clergyman. That the complaint is founded on this relationship is confirmed by the pleading of a respondeat superior claim against the Rye Presbyterian Church, of which Rev. Bishop was then pastor."

779 F.Supp. at 326-327.

2. Whether the trial court committed reversible error in admitting other acts evidence.

The Court of Appeals sustained the trial court's reception of other acts evidence based on a cursory treatment of the elements of the *Spoto* test (named for *People v.*

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would involve some objective standard of conduct. To some extent, Judge Criswell has adopted that approach, holding that expert testimony as to a standard of care or a breach of that standard is impermissible. However, we respectfully submit that the Court of Appeals' holding did not go far enough. Under the facts of this case, as set forth in the record, there is no allegation of overt sexual activity by Homer Wolfe of the type which might be condemned under an objective fiduciary standard. The plaintiffs' case amounts to Mr. Wolfe's alleged use of massage as a counseling technique, their criticism of this religiously motivated conduct, and their subjective claims based on that conduct. Such claims are categorically barred by Section III.C. of *Destefano v. Grabrian*, precisely because of this court's unwillingness to wade into a quagmire to try to determine what, if any, "clergy malpractice" claims might withstand applying First Amendment analysis to this case.

Spoto, supra). With all due respect to the Court of Appeals, we respectfully submit that it has improperly applied the *Spoto* test, so as to allow evidence of events which had no meaningful similarity to any of the events alleged by plaintiff John DeBose. This is analyzed at length in Section C of appellant Wolfe's Amended Opening Brief in the Court of Appeals, and space does not permit us to reiterate that analysis here. Perhaps more importantly, the proponent of the evidence in the trial court (plaintiffs' counsel) failed to address the *Spoto* test in any meaningful fashion, and the trial court failed to give any meaningful treatment to the *Spoto* test. Both counsel and the court resorted to a litany of possible exceptions (motive, plan, intent, accident, or mistake) without any pretense of the point-by-point *Spoto* analysis for any one exception. Vol. 10 38:12-15, Vol. 10, 4:24-6:1. The *Spoto* test clearly contemplates that the proponent of the evidence must make a specific showing as to every element, and that the trial court must make a clear finding as to every element. Allowing this omission to be remedied on appeal, by a cursory after-the-fact analysis, does violence to the very concept of the *Spoto* case.

CONCLUSION

For the reasons set forth above, petitioner Homer Wolfe respectfully requests that this court grant his Petition for a Writ of Certiorari in this case.

Respectfully submitted

HIBSCHWEILER & JOHNSON

By _____

James D. Johnson, Reg. No. 9035
Sheila E. Barthel, Reg. No. 21310
2696 South Colorado Blvd., Suite 595
Denver, Colorado 80222
(303) 692-0900

ATTORNEYS FOR PETITIONER
HOMER WOLFE

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Petition for Writ of Certiorari on Behalf of Petitioner Homer Wolfe has been served on counsel of record this 6th day of February, 1995, by placing same in the United States mail, postage prepaid, addressed as follows:

Ms. Joyce Seelen
Holland, Seelen & Pagliuca
One Norwest Center, Suite 2530
Denver, Colorado 80203

Mr. Neil Quigley
Quigley & Bruce
1010 Cherry Tower
950 South Cherry Street
Denver, Colorado 80222

APPENDIX T

SUPREME COURT, STATE OF COLORADO
CASE NO. 95SC42
CERTIORARI TO THE COLORADO COURT
OF APPEALS, 92CA1929
DISTRICT COURT, CITY AND
COUNTY OF DENVER, 91CV4346

ORDER OF COURT

BEAR VALLEY CHURCH OF CHRIST, a Colorado corporation,

Petitioner/Cross-Respondent,

v.

DENISE DeBOSE, and J.D.B. a minor child, by and through his parent and next friend, Denise DeBose,

Respondents/Cross-Petitioners,

and

HOMER WOLFE,

Respondent/Cross-Petitioner.

Upon consideration of the Motion for Reconsideration and the Responses thereto, and now being sufficiently advised in the premises,

IT IS THIS DAY ORDERED that the issues previously granted are revised and two additional issues are GRANTED. The briefs shall be filed as follows:

(a) Petitioner/Cross-Respondent's Opening Brief shall be filed within forty days from this date;

(b) Respondent(s)/Cross-Petitioner(s)' Combined Answer/Opening Brief(s) shall be filed within thirty days from receipt of the Opening Brief;

(c) Petitioner/Cross-Respondent's Combined Answer/Reply Brief shall be filed within thirty days from receipt of the Combined Answer/ Opening Brief(s); and

(d) Respondent(s)/Cross-Petitioner(s)' Reply Brief(s) may be filed within fourteen days from receipt of the Combined Answer/Reply Brief.

Pursuant to C.A.R. 54(a), the record on file will be treated as though sent up in response to a formal writ.

The issues announced by the Court this day are as follows:

1. Whether the First Amendment provides a defense to tort claims if the alleged tortious conduct is motivated by a sincerely held religious belief.

2. Whether the court of appeals erred in holding that expert testimony regarding conduct appropriate in counseling a minor was admitted in error.

3. Whether the court of appeals departed from accepted precedent in reversing verdicts where the defendants did not object to the instructions or verdict forms at trial or on appeal.

4. Whether the court of appeals erred in reversing the jury verdicts based on their form.

BY THE COURT, EN BANC, JULY 19, 1995.

cc:

(SEAL)

Neil Quigley
QUIGLEY & BRUCE
1010 Cherry Tower
950 South Cherry Street
Denver, CO 80222

Joyce Seelen
Jeffrey Pagliuca
HOLLAND, SEELEN & PAGLIUCA
1700 Lincoln, #2530
Denver, CO 80203

James D. Johnson
Sheila E. Barthel
HIBSCHWEILER & JOHNSON
2696 South Colorado Blvd., #595
Denver, CO 80222

Honorable Herbert L. Stern, III
Denver District Court
City and County Building
1437 Bannock Street
Denver, CO 80202

Clerk of the District Court
Denver District Court
City and County Building
1437 Bannock Street
Denver, CO 80202

Patrick H. Stanford, Clerk
Colorado Court of Appeals

Supreme Court
State of Colorado
Certified to be a full,
true and correct copy

JUL 19 1995

MAC V. DANFORD
Clerk of the
Supreme Court
By /s/ Illegible
Deputy
Clerk

Court Seal

APPENDIX U

SUPREME COURT, STATE OF COLORADO

Case No. 95-SC-42

COMBINED OPENING/ANSWER BRIEF OF
RESPONDENT/CROSS-PETITIONER
HOMER WOLFE

BEAR VALLEY CHURCH OF CHRIST, a Colorado Corporation,

Petitioner/Cross-Respondent,

v.

DENISE DeBOSE AND J.D.B., a minor child, by and through his parent and next friend, Denise DeBose,

Respondents/Cross-Petitioners,

and

HOMER WOLFE,

Respondent/Cross-Petitioner.

REVIEW ON CERTIORARI FROM THE
COLORADO COURT OF APPEALS

Counsel for Respondent/Cross-Petitioner Homer Wolfe:

James D. Johnson, Reg.No. 9035
Sheila E. Barthel, Reg.No. 21310
Hibschweiler & Johnson
2696 South Colorado Blvd., Suite 595
Denver, Colorado 80222
(303) 692-0900

IV. ARGUMENT

A. THE FREE EXERCISE CLAUSE IN THE FIRST AMENDMENT TO THE UNITED STATES CONSTITUTION PROVIDES A DEFENSE TO THE TORT CLAIMS STATED AGAINST DEFENDANT HOMER WOLFE IN THIS CASE IF THE ALLEGED TORTIOUS CONDUCT IS MOTIVATED BY A SINCERELY HELD RELIGIOUS BELIEF.

The religion clauses of the First Amendment to the United States Constitution have been held applicable to the states under the Fourteenth Amendment. See *Cantwell v. Connecticut*, 310 U.S. 296, 60 S.Ct. 900, 84 L.Ed. 1213 (1939). In *Destefano v. Grabrian*, this court acknowledged that spiritual counseling may implicate these First Amendment rights and that, if Father Grabrian had been motivated by sincerely held religious beliefs, "we would have to resolve a difficult first amendment issue." 763 P.2d at 283, 284. Homer Wolfe maintains that his conduct in pastoral counseling of John DeBose was an expression of sincerely held religious beliefs, and so this constitutional issue must now be faced.

To answer the First Amendment question framed by the court, it is necessary to determine the governing standard and then to apply that standard. However, the wording of the constitutional issue announced by the court is very broad in some respects and narrow in others, and may be subject to misinterpretation. To place this issue in perspective, the explicit or implicit limitations on the scope of the issue will first be noted after which the issues as so limited will be addressed.

1. LIMITATIONS ON THE SCOPE OF THE CONSTITUTIONAL ISSUE FRAMED BY THE COURT.

a. The Constitutional Issue Is Limited to the Free Exercise Clause of the First Amendment.

Although the issue as framed refers to "the First Amendment," that Amendment contains two "religion" clauses, the Free Exercise Clause and the Establishment Clause. The requirement of a sincerely held religious belief is only pertinent to the analysis of the Free Exercise Clause. The grant of certiorari refers to a sincerely held religious belief, so this issue is understood actually to relate only to the Free Exercise Clause.

b. The Constitutional Issue Is Understood to Build on the Foundation of the Colorado Supreme Court's Earlier Rulings That a Claim for "Clergy Malpractice" Is Not Recognized Because of the Constitutional Problems Associated with Such a Claim.

Defense counsel understand this court to be building on the framework of *Destefano* and *Moses v. Diocese of Colorado*, 863 P.2d 310 (Colo. 1993), cert.den. ___U.S.___, 114 S.Ct. 2153, 128 L.Ed.2d 880 (1994), in which this Court already declined to recognize "clergy malpractice," because of constitutional problems surrounding such a cause of action. Therefore, the grant of certiorari is further understood to focus on *other* tort liability.

c. The Constitutional Issue Accepts as a Given, for Purposes of Analysis, that Defendant Wolfe's Conduct Was Religiously Motivated

The grant of certiorari treats it as a *given* for purposes of the constitutional analysis that the defendant *has* a sincerely held religious belief, which motivated his conduct. Therefore, the court is not reviewing the rulings that the evidence was sufficient to raise the issue of religious motivation, or that sincerity is a jury question. The grant of certiorari is limited to the question of whether the Free Exercise Clause *ever* provides a tort defense, even given the motivation of a sincerely held religious belief.

d. By Definition, This Issue Excludes from the Analysis Any Form of Conduct Which Is Not Religiously Motivated

Since this issue presupposes that the defendant's conduct was motivated by a sincerely held religious belief, it by definition excludes the class of tort claims against clergymen in which the defendant's actions are not *claimed* to be motivated by religious beliefs. That class of tort cases not subject to Free Exercise analysis would include (1) ordinary negligence cases (e.g., negligence by a clergyman in the operation of a motor vehicle, or a negligence claim against a church based on a slip-and-fall on its premises), for which no motivation by a sincerely held religious belief is claimed; (2) cases involving intentional torts where no sincerely held religious belief is

involved (e.g., assault or battery coincidentally committed by a clergyman); and (3) cases involving certain other theories (e.g., "breach of fiduciary duty" or "outrageous conduct" by a clergyman who engages in sexual relations with a member of his congregation), where the defendant claims no religious motivation for his actions.

e. The Constitutional Issue Necessarily Focuses on the Conduct Alleged in This Case and the Claims Stated in this Case.

It is further necessary to note that the types of conduct stipulated to arguably be motivated by a sincerely held religious belief, and the types of claims arising out of such conduct, may vary. "Tort claims" are not fungible for purposes of Free Exercise analysis, and a categorical "yes" or "no" answer to the question framed by the court is not possible.

Under Article VI, Section 3, of the Colorado Constitution, appellate courts are prohibited from rendering advisory opinions on hypothetical fact situations or otherwise deciding abstract legal questions. *People ex rel. Danielson v. Amity Mut. Irr.*, 668 P.2d 1368 (Colo. 1983); *Kemp v. Empire Sav., Bldg. and Loan Ass'n*, 660 P.2d 899 (Colo. 1983); *People v. Campbell*, 196 Colo. 390, 589 P.2d 1360 (Colo. 1978); *Cameron v. Carroll & Co.*, 148 Colo. 432, 334 P.2d 748 (1959); and *State ex rel. State Board of Agriculture v. Leddy*, 60 Colo. 498, 154 P. 94 (1916). This is comparable to the "case or controversy" requirement under Article III

in the United States Constitution.[1] If the court tried to provide a categorical answer, without regard for the specific conduct involved in this case or the specific claims stated against the defendants, that broad opinion would be dicta, and not controlling on later decisions. *Young v. People*, 54 Colo. 293, 130 P. 1011 (1913); *Coon v. Berger*, 41 Colo.App. 358, 588 P.2d 386 (1978), aff'd on other grounds, 199 Colo. 133, 606 P.2d 68 (1980). Therefore, it is incumbent on the court to decide only the availability of a Free Exercise defense to claims of the type actually stated, with reference to the specific facts of this case.

2. THE APPLICABLE STANDARD FOR REVIEW UNDER THE FREE EXERCISE CLAUSE

This analysis of the applicable standard starts with the Compelling State Interest Test, and counsel for defendant Wolfe submit that it comes out at that test.

a. The Compelling State Interest Test

In general, cases under the Free Exercise Clause have been governed by the Compelling State Interest Test, which is traceable to *Sherbert v. Verner*, 374 U.S. 398, 83 S.Ct. 1790, 10 L.Ed.2d 965 (1963), and *Wisconsin v. Yoder*, 406 U.S. 205, 92 S.Ct. 1526, 32 L.Ed.2d 15 (1972). This is a 3-stage analysis: (1) whether the conduct in question is

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[1] See *Poe v. Ullman*, 367 U.S. 497, 81 S.Ct. 1752, 6 L.Ed.2d 989 (1961); *United States v. Fruehauf*, 365 U.S. 146, 81 S.Ct. 547, 5 L.Ed.2d 476 (1961); *Keller v. Potomac Elec. Power Co.*, 261 U.S. 428, 43 S.Ct. 445, 67 L.Ed. 731 (1923); and *Muskrat v. United States*, 219 U.S. 346, 31 S.Ct. 250, 55 L.Ed. 246 (1911).

motivated by a sincerely held religious belief; (2) whether the state action infringes on the free exercise of religion; and (3) whether there is a state interest of sufficient magnitude to override the interest claiming protection under the Free Exercise Clause. 92 S.Ct. at 1532. The third stage of this analysis requires a balancing of interests: whether the state's interest is so compelling that the individual's free exercise interest must give way. If an overriding state interest is demonstrated, the state must use the least intrusive means to protect that interest. *Cantwell v. Connecticut, supra; McDaniel v. Paty,* 435 U.S 618, 98 S.Ct. 1322, 55 L.Ed.2d 593 (1978); *Thomas v. Review Board,* 450 U.S. 707, 101 S.Ct. 1425, 67 L.Ed.2d 624 (1981); *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah,* ___U.S.___, 113 S.Ct. 2217, 124 L.Ed.2d 472 (1993).

b. The Neutral Law of General Applicability Exception: *Employment Division v. Smith*

In *Employment Division v. Smith,* 494 U.S. 872, 110 S.Ct. 1595, 108 L.Ed.2d 876 (1990), Justice Scalia, writing for a plurality, stated that a neutral law of general applicability may be given effect, even though it has the incidental effect of burdening an individual's free exercise of religion, without triggering the Compelling State Interest analysis. There the petitioner was denied unemployment compensation benefits after he was fired from his job for using peyote in Native American religious rituals. Under Oregon and federal law, peyote is a controlled substance, the use or possession of which is a criminal offense, but Smith argued that his use was constitutionally protected.

Writing for a plurality, Justice Scalia conducted an analysis focusing on the fact that the criminal statutes prohibiting use or possession of peyote were neutral laws of general applicability, which were applicable across the board, and did not depend on the religious context in which the defendant happened to be using peyote. Since this was a neutral law of general applicability, the state's action, in denying unemployment compensation benefits to Smith because he was fired for illegal conduct, was upheld.

c. "As Applied": *Church of Lukumi Babalu Aye v. City of Hialeah*

In the later case of *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah* [sometimes hereafter referred to as *"Lukumi Babalu Aye"*], the U.S. Supreme Court acknowledged the holding of *Employment Division v. Smith*, but nevertheless returned to the Compelling State Interest Test, because the ordinances there in question were *not* "neutral laws of general applicability" *as applied*. Justice Kennedy noted that:

> "Facial neutrality is not determinative. The Free Exercise Clause, like the Establishment Clause, extends beyond facial discrimination. The Clause 'forbids subtle departures from neutrality,' *Gillette v. United States*, 401 U.S. 437, 452, 91 S.Ct. 828, 28 L.Ed.2d 168 (1971), and 'covert suppression of particular religious beliefs,' *Bowen v. Roy, supra*, at 703, 106 S.Ct. 2147, 90 L.Ed.2d 735 (opinion of Burger, C.J.). Official action that targets religious conduct for distinctive treatment cannot be shielded by mere compliance with the requirement of facial neutrality.

> The Free Exercise Clause protects against governmental hostility which is masked, as well as overt."[2]

113 S.Ct. at 2227.

d. The Religious Freedom Restoration Act

In the wake of *Employment Division v. Smith*, commentators expressed great consternation about the prospect that the *Smith* case might have effectively abolished the Compelling State Interest Test, and gelded the Free Exercise Clause.[3] In response to the concerns expressed about *Employment Division v. Smith*, Congress adopted the Religious Freedom Restoration Act of 1993, 42 U.S.C. § 2000bb, sometimes referred to as the "RFRA." That statute legislatively mandates that "Government shall not substantially burden a person's exercise of religion even if the burden results from a rule of general applicability,"

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[2] *Wisconsin v. Yoder, supra*, had earlier said that "A regulation neutral on its face may, in its application, nonetheless offend the constitutional requirement for governmental neutrality if it unduly burdens the free exercise of religion." 92 S.Ct. at 1536. However, there seems to have been speculation that *Employment Division v. Smith* applied anytime a law was *facially* neutral. *Lukumi Babalu Aye* indicates the contrary.

[3] See, Case Note, *Employment Division v. Smith: A Giant Step Backwards in Free Exercise Jurisprudence*, 1991 B.Y.U.L. Rev. 1331 (1991) and Case Note, *Employment Division v. Smith: Free Exercise Clause Loses Balance on Peyote*, 43 Baylor L. Rev. 577 (Winter 1991). See, also, *Miller v. Civil City of South Bend*, 904 F.2d 1081, 1102-1103 (7th Cir. 1990); *United States v. Philadelphia Yearly Meeting of the Religious Soc. of Friends*, 753 F.Supp. 1300 (E.D. Pa. 1990); and *Minnesota v. Herschberger*, 462 N.W.2d 393 (Minn. 1990).

except "where it demonstrates that application of the burden to the person (1) is in furtherance of a compelling governmental interest; and (2) is the least restrictive means of furthering that compelling governmental interest." Thus, this statute in essence mandates the use of the "Compelling State Interest" Test in all cases involving the Free Exercise Clause.

The validity and implications of the Religious Freedom Restoration Act are still being determined by the courts.[4] However, counsel for respondent Wolfe respectfully submit that the Compelling State Interest Test is controlling in this case either under applicable decisions of the United States Supreme Court (especially *Lukumi Babalu Aye*) *or* under the Religious Freedom Restoration Act. The "breach of fiduciary duty" and "outrageous conduct" claims allowed to go forward against defendant Wolfe do not meet the test of "neutral laws of general applicability," precisely because their application to Mr. Wolfe was premised on his status as a clergyman. Therefore, whether or not the RFRA is deemed controlling, the result is the same. (This is discussed in Argument A.3., below.)

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[4] See, e.g., *Belgard v. State of Hawaii*, 883 F.Supp. 510 (D. Hawaii 1995) (constitutionality of RFRA upheld); *Flores v. City of Boerhe*, 877 F. Supp. 355 (W.D. Tex. 1995) (RFRA held unconstitutional); and *Canedy v. Boardman*, 16 F.3d 183 (7th Cir. 1994) (constitutionality of RFRA questioned). See, also, Hamilton, *The Religious Freedom Restoration Act: Letting the Fox into the Hen House Under Cover of Section 5 of the Fourteenth Amendment*, 16 Cardozo L. Rev. 357 (Dec.1994).

3. AS APPLIED TO IMPOSE LIABILITY ON DEFENDANT WOLFE IN THIS CASE, THE CIVIL CLAIMS FOR BREACH OF FIDUCIARY DUTY AND "OUTRAGEOUS CONDUCT" ARE NOT NEUTRAL LAWS OF GENERAL APPLICABILITY

The civil causes of action for breach of fiduciary duty and "outrageous conduct," as applied to impose liability on Homer Wolfe in this case, are not "neutral laws of general applicability." Neutrality and general applicability are distinct and separate requirements. In *Lukumi Babalu Aye*, Justice Kennedy noted that these concepts are interrelated, and that a law which fails to satisfy one requirements will, in all likelihood, fail to satisfy the other [113 S.Ct. at 2226], but failure to satisfy *either* requirement triggers Compelling State Interest analysis.

Neutrality is the first element. As noted above in Section A.2.c., a law that is neutral on its face may not be neutral *as applied*. "Improper targeting" of religious activity is an indication of non-neutrality, and the expressions of purpose associated with the enactment of a law may demonstrate improper targeting.[5] Here, the problem of applying these constitutional principles is complicated because we are dealing with common law causes of action rather than statutes. Nevertheless, the decisions handed down by the Colorado Supreme Court in *Destefano* and *Moses* themselves demonstrate this constitutionally impermissible targeting.

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[5] Note that, in evaluating whether the real object of the ordinances was to target conduct *because* it was religiously motivated, Justice Kennedy took guidance from equal protection cases. 113 S.Ct. at 2230-2231.

In *Destefano*, the court implicitly recognized that a cause of action for "clergy malpractice" would not be even *facially* neutral. Therefore, the Court declined to recognize that cause of action. However, as a surrogate for "clergy malpractice," the court reinvented the established claim for "breach of fiduciary duty," lifting it out of its traditional context, where it served to impose liability on defendants who misused their control over a plaintiff's *financial* affairs. The concept of fiduciary duties evolved to deal with situations where one person exercises control over the *financial* affairs of another. Fiduciary law developed to provide a "moral dimension to the body of law that regulates economic activity." N. Schaumann, *The Lender and Unconventional Fiduciary*, 23 Seton Hall L. Rev. 21 (1992). The limited scope of *true* fiduciary duties is demonstrated by the Uniform Fiduciaries Law, enacted in Colorado as C.R.S. §§ 15-1-101 et seq., and related statutory provisions such as the Colorado Fiduciaries' Powers Act, C.R.S. §§ 15-1-801 et seq. (See esp. definitions of "fiduciary" in §§ 15-1-103(2) and 15-1-802(3).) Even as to a true fiduciary, not all duties owed are "fiduciary" duties:

> "Finally, fiduciary duties do not include a duty of care. Fiduciaries often owe a duty of care to their beneficiaries, which in some, but not all, cases is more demanding than that owed the general public, **but not every duty owed by a fiduciary to a beneficiary is a 'fiduciary duty.'** It serves no useful purpose so to expand the idea of fiduciary duty. Although fiduciary status at times may be relevant to assessing the duty of care owed a beneficiary, the duty of care is defined and governed not by fiduciary law but by tort (and sometimes contract) law. Clarity

> of analysis is enhanced by maintaining this distinction. Tort law is no more 'fiduciary' than is tax law, although most fiduciaries are subject to both."

23 Seton Hall L. Rev. at pp. 30-31 (emphasis added). Disregarding these considerations, *Destefano* expanded breach of fiduciary duty for the purpose of imposing liability on Father Grabrian based on his status as a clergyman.

The categorization of the pastoral counselor in *Destefano* as a "fiduciary" was based on a fragment of C.J.I. Civil 2d Instruction 31:16, which was housed in the chapter dealing with *wills*. A copy is attached as Appendix A. This instruction focused initially on the requirement that the putative "fiduciary" act in some capacity where he has power to exercise financial control which affects the other party, and then defined the duty triggered. The court lifted the *duty* owed by a fiduciary out of this instruction, without regard for the status required to trigger that duty. As it existed when *Destefano* was decided, the Source and Authority for Instruction 31:16 cited several Colorado cases illustrating the types of relationships which may exhibit a fiduciary component in Colorado. Where fiduciary duty was found to exist, those cases invariably involved a "financial control" aspect which triggered the fiduciary duty.

Aside from *Destefano v. Grabrian* and *Moses v. Diocese*, all the *later* fiduciary duty cases finding a fiduciary duty have likewise involved *financial* control. See, e.g., *Rubenstein v. South Denver Nat'l Bank*, 762 P.2d 755 (1988), cert.den. (1989); and *Zick v. Krob*, 872 P.2d 1290 (Colo.App. 1993). The Supreme Court's Committee on

Civil Jury Instructions has created an entirely new chapter (Chapter 26, C.J.I. Civil 3d) to deal with the transformed, freestanding cause of action for breach of fiduciary duty understood to have been recognized in *Destefano* and reaffirmed in *Moses*. However, with the exception of the *Destefano* and *Moses* decisions, all of the cases now annotated in the Source and Authority of C.J.I. Civil 3d Instruction 26:2 involve a "fiduciary" who exercised some control over the plaintiff's *financial* affairs. (A copy of this instruction is attached as Appendix B.)

Thus, it is apparent that the traditionally narrow concept of breach of fiduciary duty was transformed in *Destefano* for the precise purpose of imposing liability on Father Grabrian based on his status as a Catholic priest who provided pastoral counseling, and the transformed cause of action is now being used to get other clergymen based on their status as such.

In *Moses v. Diocese*, defense counsel raised the argument that the manifestation of "breach of fiduciary duty" recognized in *Destefano v. Grabrian* was simply another way of denominating a claim for clergy malpractice. The Colorado Supreme Court rejected that argument, on the basis that the clergyman's liability for breach of fiduciary duty was unrelated to his "professional" status as a clergyman, which the court said would justify treating that claim differently from a claim for "clergy malpractice":

> "The fundamental difference between the two causes of action is the former is a breach of trust and does not require a professional relationship or a professional standard of care, while the latter is an action for negligence based on a professional relationship and a professional

> standard of care. In *Destefano*, we held the defendant owed a fiduciary duty to the plaintiff that 'was created by his **undertaking to counsel** [the plaintiff].' *Destefano v. Grabrian*, 763 P.2d 275, 284 (Colo. 1988). The **position of trust** occupied by the defendant, when coupled with his **positive act of counseling** the plaintiff, resulted in a duty to the plaintiff. The relevant common facts in *Destefano* and Tenantry's case are not the profession of the defendants; the relevant facts are that the defendants in both cases occupied a position of superiority, assumed a duty to act in good faith, and then breached their duty. In Colorado, breach of fiduciary duty is actionable, clergy malpractice is not. Id. at 384-86."

863 P.2d at 321, footnote 13 (emphasis supplied). However, just as Father Grabrian's "position of trust" *was* his position as a Catholic priest, and the counseling he undertook was *pastoral counseling*, Bishop Frey's "position of trust" in the *Moses* case was his "superior position **as a counselor, a bishop, and a final arbiter of problems with the clergy.**" 863 P.2d at 322 (emphasis added). The court referred to Bishop Frey's "position of authority in the church," which gave him "the power to resolve conflicts in the church." Id. The court also referred to the plaintiff's belief that Bishop Frey "had the power to decide if she would lose her salvation." Id. The court also stated that, although the "clergy-parishioner" relationship is not necessarily a "fiduciary" relationship, it does "involve the type of interaction that creates trust and reliance," and ended with the statement that "Courts *have* recognized the fiduciary nature of the clergy-parishioner relationship." Id.

Therefore, even though the black and white statement of the expanded cause of action for "breach of fiduciary duty" may suggest facial neutrality, when this tort cause of action is applied to clergymen it is not neutral. When a clergyman is sued for breach of fiduciary duty, it is his *status* as a clergyman which allegedly gives rise to the existence of a fiduciary duty, and plaintiffs' counsel generally make the effort (as they did in this case) to establish the existence of a pastoral counseling relationship, since that is the one context in which the Colorado Supreme Court has found this new species of fiduciary duty. A civil claim for breach of fiduciary duty which grows out of that religious status cannot possibly constitute a neutral law of general applicability. As applied to the individual defendant, the fiduciary duty is premised on his status as a clergyman, and more particularly on his status as a clergyman providing pastoral counseling. The fact that a stockbroker may be subject to breach of fiduciary duty for churning his client's stock investments, or that a lawyer may be subject to breach of fiduciary duty for dissipating funds which he holds in trust for a client, does not make this new form of fiduciary law a "neutral law of general applicability" when it is used to impose liability on a clergyman based on his status **as a clergyman**.

A state supreme court plays two roles. Acting as the ultimate arbiter of the boundaries and characteristics of the Colorado common law, the *Destefano* court declined to fashion a cause of action for "clergy malpractice" under the Colorado common law, but then proceeded to rip "breach of fiduciary duty" free from its traditional moorings to fill the "clergy malpractice" void. The Colorado

Supreme Court certainly has the power to redefine the common law in this state. However, the Colorado Supreme Court also plays a second role, applying the U.S. Constitution, and it is subordinate to the **United States** Supreme Court in that regard. The redefined concepts of "fiduciary relationship" and "fiduciary duty" would have to pass **constitutional** muster under the religion clauses of the First Amendment, when the redefined cause of action is applied to impose liability on clergymen and religious institutions based on their status as such. Defense counsel respectfully submit that the semantic distinction between clergy malpractice and breach of fiduciary duty has no constitutional dimension. As stated in *Schmidt v. Bishop*, 779 F.Supp. 321, 326 (S.D.N.Y. 1991), the fiduciary duty claim raises "the **same** constitutional difficulties encountered in articulating the generalized standard of care for a clergyman required by the law of negligence." See, also, *Dausch v. Rykse*, 52 F.3d 1425 (7th Cir. 1994), aff'g in part and rev'g in part *Dausch v. Rykse*, 1993 WL 34873 (N.D.Ill. 1993). The same is true if "outrageous conduct" is used to fill the void.

Furthermore, it is critical to note that this cause of action for breach of fiduciary duty is not *applied* in the same manner to other types of defendants as to clergymen. In *Crystal Homes v. Radetsky*, 895 P.2d 1179, 1182 (Colo.App. 1995), the plaintiff tried to sidestep the requirement that a client suing a lawyer for professional malpractice must present expert testimony establishing a standard of care and the lawyer's breach thereof, by suing for breach of fiduciary duty, based on the alleged existence of a "confidential relationship between the parties independent of any lawyer-client relationship."

Although the Court of Appeals acknowledged the *Moses* decision, it went on to say that "the foundation for any confidential or fiduciary relationship asserted here was necessarily based upon the alleged attorney-client status between the parties," since there was "no other basis alleged for plaintiff's asserted justifiable reposition of special trust or confidence in defendant." Thus the court ruled that any duties owed by the defendant attorney "would be measured against standards applicable to attorneys." Thus, when the plaintiff is making a claim against his attorney, based on his status as an attorney, the plaintiff is relegated to a legal malpractice claim. He cannot transform this into a "breach of fiduciary duty claim," even though his evidence shows the requisite "justifiable reposition of special trust or confidence" in the defendant. When the defendant is a clergyman, however, the plaintiff is allowed to invoke the transformed cause of action for "breach of fiduciary duty," precisely because no "clergy malpractice" claim is available against the defendant. This demonstrates that the transformed "breach of fiduciary duty claim" has been appropriated to accomplish indirectly what the court recognized it could not accomplish directly. As Justice Kennedy recognized in *Lukumi Babalu Aye*, "the effect of a law in its real operation is strong evidence of its object." 113 S.Ct. at 2228.

Lukumi Babalu Aye also held that one ordinance was not neutral because it represented "a system of 'individualized governmental assessment of the reasons for the relevant conduct.' " 113 S.Ct. at 2229. Similarly, the essence of these common law claims is to establish a

system of individualized governmental assessment of the reasons for the defendant's conduct.[6]

The cause of action for "breach of fiduciary duty," as applied to impose liability on clergymen and religious institutions, also fails as a law of "general applicability." In *Employment Division v. Smith*, the statute prohibiting the use or possession of peyote was considered to be a law of general applicability precisely because it applied to everyone. When the peyote statute was applied to Smith, it was *not* applied to him *because* of his status as an adherent of a Native American religion. The fact that the application of this general law burdened Smith's religious practice was treated as an "incidental effect." In this case, the transformed cause of action for "breach of fiduciary duty," on its face does not apply to everyone, but only to certain persons considered to be in a superior position in

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[6] It is worth noting that *Lukumi Babalu Aye*'s neutrality analysis also borrowed a variant of the "least restrictive means" test (discussed below in Argument A.4.c.), finding "significant evidence of the ordinances' improper targeting of Santeria sacrifice in the fact that they proscribed more religious conduct than is necessary to achieve their stated ends." 113 S.Ct. at 2229. The court later noted that "narrower regulation would achieve the city's interest in preventing cruelty to animals. . . . [R]egulation of condition and treatment, regardless of why an animal is kept, is the logical response to the city's concern, not a prohibition on possession for the purpose of sacrifice. . . . If the city has a real concern that other methods are less humane, . . . the subject of the regulation should be the method of slaughter itself not a religious classification that is said to bear some general relation to it." 113 S.Ct. at 2230. "[T]he ordinances suppress more religious conduct than is necessary in order to achieve the legitimate ends asserted in their defense." 113 S.Ct. at 2231. This brings the analysis full circle.

whom trust has been reposed. Furthermore, as applied to impose liability on clergymen, it is precisely their *status* as clergymen which triggers the liability.

In *Lukumi Babalu Aye*, Justice Kennedy concluded that it was not necessary there to "define with precision the standard used to evaluate whether a prohibition is of general application," because the City of Hialeah's ordinances were clearly too underinclusive to qualify. 113 S.Ct. at 2232. The court held that, to the extent the city might have had legitimate interests in protecting the public health and preventing cruelty to animals, the ordinances should have been directed at *conduct* contrary to these interests without regard for who might engage in that conduct. Because they were tailored to "rituals" and "sacrifices," the ordinances were not "generally applicable." In this case, the transformed cause of action for "breach of fiduciary duty," is not generally applicable on its face, and it is certainly selectively applied to clergymen and religious institutions. Conduct-oriented government action (such as a criminal assault statute or the civil tort of battery) may be "generally applicable," but this status-based claim is not.

Thus, the transformed cause of action for "breach of fiduciary duty" recognized and applied in *Destefano v. Grabrian* and *Moses v. Diocese* is neither a neutral law nor a law of general applicability. That requires that its application to Homer Wolfe be strictly scrutinized under the Compelling State Interest Test, given the assumed religious motivation.

The foregoing analysis has focused on the claim for breach of fiduciary duty. Defendant Wolfe is also challenging the "outrageous conduct" claim on constitutional grounds. On its face, the tort of "outrageous conduct" may seem like a better candidate to qualify as a neutral law of general applicability. As defined in C.J.I. Civil 3d Instruction 23:1, liability for outrageous conduct may be imposed anytime the jury finds (1) that the defendant engaged in "extreme and outrageous conduct," (2) that when the defendant engaged in that conduct, he acted recklessly or with the intent of causing the plaintiff severe emotional distress, and (3) that the plaintiff incurred severe emotional distress as a result of the defendant's conduct. Thus, more so than the transformed claim for "breach of fiduciary duty," "outrageous conduct" on its face is not directly targeted toward clergymen or religious institutions. Nevertheless, **as applied** to impose liability on a clergyman, it is precisely the defendant's *status* as a clergyman which is emphasized as the factor which makes his conduct "extreme and outrageous." This places a lay jury in the position of deciding whether a reasonable member of the *secular* community would regard the clergyman's conduct, in his capacity as a clergyman, as "atrocious, going beyond all possible bounds of decency and utterly intolerable in a civilized community." See C.J.I. Civil 3d Instruction 23:2. Unlike civil liability for negligence in the operation of a motor vehicle, or even civil liability for assault and battery, the tort of "outrageous conduct" clearly does not involve any objective criteria for imposition of liability. In fact, by its very nature, the tort of "outrageous conduct" is a gap-filler tort, which is supposed to be available in situations

where traditional tort theories would not provide for recovery, but the court wants to give the plaintiff a cause of action.[7] Thus, by its very nature, "outrageous conduct" involves looking at the particular circumstances of the case, and applying a subjective standard. This in no way qualifies as a neutral law of general applicability, when it is applied to impose liability because of the secular jury's perceptions of what **a clergyman** should and should not do **as a clergyman**. In essence, this becomes a special claim tailored to impose liability on clergymen, because no general *or* neutral standard is applied.[8] Allowing a civil jury to impose liability on a clergyman, for religiously motivated conduct, based on this highly subjective standard, results in suppression of viscerally unpopular views. This is precisely what the religion clauses were intended to prevent: "Indeed, it was 'historical instances of religious persecution and intolerance that gave concern to those who drafted the Free Exercise Clause.' " *Lukumi Babalu Aye*, 113 S.Ct. at 2226 (citations

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[7] See *Rigazio v. Archdiocese of Louisville*, 853 S.W.2d 295 (Ky.App. 1993); *Rice v. Janovich*, 742 P.2d 1230 (Wash. 1987); *Criss v. Criss*, 356 S.E.2d 620 (W.Va. 1987); and *Todd v. South Carolina Farm Bureau Mut. Ins. Co.*, 283 S.C. 155, 321 S.E. 2d 602 (1984); and *Bankhead v. City of Tacoma*, 597 P.2d 920 (Wash.App. 1979).

[8] "[A] court cannot remedy religiously motivated intentional infliction of emotional distress without, in effect, taking sides in a religious dispute. The principles of neutrality developed by the Supreme Court are, therefore, of no use here. Only if the conduct in question has been held not to be religious could the court avoid inquiry into religious doctrine while awarding damages against a spiritual counselor for counseling conduct." Note, *Intentional Infliction of Emotional Distress by Spiritual Counselors: Can Outrageous Conduct Be "Free Exercise"?*, 84 Mich.L.Rev. 1296, 1312 (May 1986).

omitted). This is not regulation *in spite of* the religious context, but regulation *because of* the religious context.[9]

4. APPLICATION OF THE COMPELLING STATE INTEREST TEST IN THIS CASE

As noted above in Argument A.2.b.1., the Compelling State Interest Test has 3 prongs. Each will be addressed in turn.

a. The First Prong: The Conduct in Question Is Motivated by a Sincerely Held Religious Belief

The first prong of the Free Exercise Clause is whether the conduct in question is motivated by a sincerely held religious belief. In this case, the Court of Appeals held that there was sufficient evidence to satisfy this prong, *if* the jury found that defendant Wolfe was sincere in claiming that his conduct was religiously motivated. Consistent with *United States v. Ballard*, 322 U.S. 78, 64 S.Ct. 882,

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[9] *Lukumi Babalu Aye* cited *Personnel Administrator of Massachusetts v. Feeney*, 442 U.S. 256, 99 S.Ct. 2282, 2296, 60 L.Ed.2d 870 (1979), for the proposition that "discriminatory purpose" implies that the state has acted " 'because of,' not merely 'in spite of,' " the impact on the affected class. 113 S.Ct. at 2231. Any effort to excuse "outrageous conduct" from constitutional constraints by the expedient of labeling it as a "neutral law of general applicability," in spite of its completely subjective standards, certainly misuses the *Smith* decision. If that evasion is not dismissed out of hand, then the entire premise of *Smith*'s "neutral law of general applicability" exception would have to be reexamined. See Justice Souter's concurrence in *Lukumi Babalu Aye*, at 113 S.Ct. 2240-2250.2

88 L.Ed. 1148 (1944), the Court of Appeals held that neither the court nor the jury could inquire into the validity of the asserted religious belief or practice, but that the question of whether this belief was sincerely held was a question of fact for the jury. The issue framed by this court presupposes that the defendant's conduct was motivated by a sincerely held religious belief, and then asks whether, given that predicate, the First Amendment provides a defense. Therefore, this court is accepting, for purposes of this certiorari review, that the first prong of the Compelling State Interest Test has been satisfied.

b. The Second Prong: The State Action in the Form of These Civil Causes of Action Constitutes a Substantial Burden on the Defendant's Free Exercise of Religion

The second prong of the Compelling State Interest Test involves a determination as to whether the state action infringes on the free exercise of religion. Allowing claims for breach of fiduciary duty and outrageous conduct of the type filed against Wolfe by the DeBoses would necessarily have a chilling effect on Wolfe's free exercise of his religious beliefs. The central purpose of this lawsuit is to subject Mr. Wolfe (and BVCC) to liability based on the pastoral counseling provided to John DeBose. In some abstract sense, it may be possible to argue that civil damages are not primarily intended to perform a behavior-shaping function, but to compensate the plaintiff for his injuries. However, the practical reality is that exposure to liability for compensatory damages obviously has

its own chilling effect on the free exercise of religion.[10] As stated in *Schmidt v. Bishop*, 779 F.Supp. at 332, "Any award of damages would have a chilling effect leading indirectly to state control over the future conduct of a religious denomination. . . . " [Citing *Watson v. Jones*, 80 U.S. 679, 13 Wall. 679, 20 L.Ed. 666 (1871).]

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[10] Through the courts, the state defines what common law civil causes of action will be recognized, and provides the means for plaintiffs to obtain judgments. "It is a basic premise of our jury system that the court states the law to the jury and that the jury applies that law to the facts as the jury finds them." *Delli Paoli v. U.S.*, 352 U.S. 231, 77 S.Ct. 294, 300, 1 L.Ed.2d 278 (1957). As stated in *Edmonson v. Leesville Concrete Co.*, 500 U.S. 614, 111 S.Ct. 2077, 2082, 114 L.Ed.2d 660 (1991), "Although the conduct of private parties lies beyond the Constitution's scope in most instances, governmental authority may dominate an activity to such an extent that its participants must be deemed to act with the authority of the government and, as a result, be subject to constitutional constraints." In that case, the U.S. Supreme Court held that even the exercise of peremptory challenges by private litigants in a civil action is subject to constitutional constraints, because the jury selection procedure constitutes state action. In so holding, the court focused on various factors, including the "direct and indispensable participation of the judge, who beyond all question is a state actor"; the government's creation of "the legal framework governing the [challenged] conduct"; the jury's "exercise [of] the power of the court and of the government that confers the court's jurisdiction"; in a case involving punitive damages, the jury's responsibility to "weigh the gravity of a wrong and determine the degree of the government's interest in punishing and deterring willful misconduct"; and the fact that the verdict will be reduced to a "judgment enforceable by the court." 111 S.Ct. at 2085. The court stated that "These are traditional functions of government, not of a select, private group beyond the reach of the Constitution." Id.

c. The Third Prong: There Is No State Interest of Sufficient Magnitude to Override the Defendant's Free Exercise Rights in This Case, and Civil Claims for Breach of Fiduciary Duty and "Outrageous Conduct" Are Not the Least Intrusive Means of Protecting That Interest.

The third prong of the Compelling State Interest Test is whether the state has a compelling interest which outweighs the defendant's right to free exercise of religion, and whether the mechanism in question is the least restrictive means of protecting that compelling state interest. It seems worth repeating that the question in this particular case is whether the state has a compelling state interest in regulating the particular conduct of which Homer Wolfe is accused, and whether these subjective claims for breach of fiduciary duty and "outrageous conduct" are the least restrictive means of guarding that compelling state interest (if any).

Focusing on the conduct actually supported by the evidence, there simply is no compelling state interest present in this case, which could serve to justify the burden placed on the defendant's free exercise of religion.[11] However, if there is some state interest, that

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[11] Although the issue as framed takes religious motivation as a given, the determination of whether there is a compelling state interest in regulating the conduct may depend at a visceral level on the nature of the conduct alleged. In this case, plaintiffs' counsel have consistently tried to portray this as a case involving sexual abuse of the minor plaintiff during pastoral counseling. Much of the expert testimony presented by plaintiffs' counsel was designed to foster that impression. See

would require a balancing of interests, including consideration of whether these subjective common law claims are the least intrusive means of protecting the ostensible "compelling state interest."

In this regard, it is useful to look back to *Cantwell v. Connecticut, supra,* which involved a criminal prosecution on a common law offense of inciting a breach of the peace. There the court noted that the conviction was not based on a narrowly drawn statute evincing a specific legislative judgment, which would be more likely to hold up. Instead, the court noted "the judgment is based on a common law concept of the most general and undefined nature." 60 S.Ct. at 905. Thus, even though the court recognized a state interest there, it concluded that this vague, subjective common law remedy was not calculated to protect that interest:

> "Here we have a situation analogous to a conviction under a statute sweeping in a great variety of conduct under a general and indefinite characterization, and leaving to the executive and judicial branches too wide a discretion in its application.
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the testimony summarized in Argument D.3. in the Amended Opening Brief of Appellant Homer Wolfe in the Court of Appeals, at pp. 42-43. See, also, the Appellee's Answer Brief to Defendant-Appellant Homer Wolfe in the Court of Appeals, at pp. 1-2, 7-9, 17. In fact, the record *does not* support the plaintiffs' characterization. See the analysis at pages 11 through 18 in the Reply Brief of Appellant Homer Wolfe in the Court of Appeals. For convenient reference, a copy is attached hereto marked as Appendix C.

> "Although the contents of the record not unnaturally aroused animosity, we think that, in the absence of a statute narrowly drawn to define and punish specific conduct as constituting a clear and present danger to a substantial interest of the State, the petitioner's communication, considered in the light of the constitutional guarantees, raised no such clear and present menace to public peace and order as to render him liable to conviction of the common law offense in question."

60 S.Ct at 905, 906. To whatever extent the state is considered to have a compelling interest in regulating conduct in the context of pastoral counseling, a civil cause of action which depends on a subjective standard of conduct simply cannot be considered the least intrusive means of advancing the compelling state interest.

In this case, the trial court suggested the flogging of a counselee by a pastoral counselor as one example of conduct so extreme as to be subject to regulation by the state. [Vol. 6, 32:10-16.] In that hypothetical situation, the appropriate means of regulating that conduct would most likely be the enforcement of a facially neutral *criminal* statute of general application. It is conceivable that, in a case involving such harmful or offensive physical contact by a pastoral counselor with a counselee, a *civil* action for battery might be accepted as a least intrusive means of dealing with that conduct. In *Schmidt v. Bishop, supra*, the court did state that "The facts alleged in the complaint support clearly an action for a battery or some similar intentional tort," and that "existing laws against battery, and the criminal statute against sexual abuse if timely

invoked, provide adequate protection for society's interests." 779 F.Supp. at 324, 328. The Missouri Supreme Court seems to have drawn the line in that manner, in the case of *Hester v. Burnett*, 723 S.W.2d 544, 554 (Mo.App. 1987), holding that intentional tort claims may be brought against a clergyman, but that other claims cannot. Even if John DeBose had a colorable civil claim for battery, however, opening the door for that claim would not open the door to subjective fiduciary duty and outrageous conduct claims.

Respectfully submitted,

HIBSCHWEILER & JOHNSON

By _____
James D. Johnson, Reg. No. 9035

Sheila E. Barthel, Reg. No. 21310
Attorneys for Respondent
Homer Wolfe
2696 South Colorado Blvd. Suite 595
Denver, Colorado 80222
(303) 692-0900

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing Combined Opening/Answer Brief of Respondent/Cross-Petitioner Homer Wolfe have been served on counsel of record this 27th day of November, 1995, by placing same in the United States mail, postage prepaid, addressed as follows:

Ms. Joyce Seelen
Holland, Seelen & Pagliuca
One Norwest Center, Suite 2530
1700 Lincoln Street
Denver, Colorado 80203

Mr. Neil Quigley
Quigley & Bruce
1010 Cherry Tower
950 South Cherry Street
Denver, Colorado 80222

APPENDIX V

SUPREME COURT, STATE OF COLORADO

Case No. 95-SC-42

RESPONDENT WOLFE'S PETITION FOR REHEARING

BEAR VALLEY CHURCH OF CHRIST, a Colorado Corporation,

Petitioner/Cross-Respondent,

v.

DENISE DeBOSE AND J.D.B., a minor child, by and through his parent and next friend, Denise DeBose,

Respondents/Cross-Petitioners,

and

HOMER WOLFE,

Respondent/Cross-Petitioner.

CERTIORARI REVIEW OF A DECISION FROM THE COLORADO COURT OF APPEALS (Court of Appeals Case No. 92-CA-1929)

TRIAL JUDGE: Herbert L. Stern, III, Denver District Court Judge

COURT OF APPEALS JUDGE WHO AUTHORED THE OPINION OF THE COLORADO COURT OF APPEALS:

John A. Criswell, Appellate Judge

OTHER JUDGES WHO PARTICIPATED IN THE APPELLATE RULING:

Daniel M. Taubman, Appellate Judge (Concurring)
Janice B. Davidson, Appellate Judge (Dissenting)

COMES NOW respondent/cross petitioner Homer Wolfe, by and through his attorneys, Hibschweiler & Johnson, and submits this Petition for Rehearing pursuant to Rule 40, Colorado appellate Rules.

ISSUES PRESENTED FOR REVIEW

The opinion issued by this court identified three issues on which the Court of Appeals was reversed: (1) the ruling that, on the evidence presented, the defendants were entitled to jury instructions relating to free exercise of religion (under the First Amendment or the Religious Freedom Restoration Act); (2) the ruling that the verdict forms were defective, so as to require a new trial; and (3) the ruling that it was error to admit certain expert testimony. Respondent Wolfe requests rehearing on all these issues.

ARGUMENT

The holding concerning the First Amendment and evidentiary issues flow from court's ruling that Wolfe demonstrated no arguable religious motivation for administration of massage to counselees. (In fact, the Colorado Supreme Court has now rejected any claim of religious motivation, in the absence of an articulated "religious belief" requiring the conduct in question.) Defense counsel respectfully submit that there was a sufficient showing of religious motivation to require jury

instructions on the "free exercise" issue. As the Court of Appeals noted, it was properly a question for the jury to decide whether the asserted religious motivation (facilitating counselees' communication with the Supreme Being) was sincere. However, there was a sufficient articulation of religious motivation to require a jury instruction.

In footnote 10, Justice Lohr rejects defense counsel's assertion that the grant of certiorari took the existence of religious motivation as given. With all due respect, defense counsel submit that a fair reading of the first issue on which certiorari was granted indicates that the issue to be reviewed by the Colorado Supreme Court was the conceptual question of whether the First Amendment provides a defense to tort claims under the specified circumstances, i.e., "if the alleged tortious conduct is motivated by a sincerely held religious belief" [emphasis added]. To frame the issue of whether defendant Wolfe had articulated a colorable "religious motivation," sufficient to raise a jury question, the logical phrasing would have been "whether the alleged tortious conduct was motivated by a sincerely held religious belief," or "whether the defendant made a sufficient showing to create a question of fact as to whether the alleged tortious conduct is motivated by a sincerely held religious belief." As it is, the questioned proposition was not whether the conduct was motivated by a sincerely held religious belief, but whether the Free Exercise Clause provides a defense to tort claims under those circumstances. If the court intended to review the existence of an asserted religious motivation, the grant of certiorari should at least have been expressed by stating the predicate in the

past tense (i.e., "if the alleged tortious conduct *was* motivated by a sincerely held religious belief"). Because defense counsel understood that the existence of motivation by a sincerely held religious belief was assumed in the grant of certiorari, that issue was not extensively briefed in the Supreme Court. (See Argument A.1.c. in Wolfe's Combined Opening/Answer Brief, Argument A.1. in Wolfe's Reply Brief Responding to the Deboses' Extra Answer Brief, and Argument A.4. in Wolfe's Final Reply Brief.) Under either the Free Exercise Clause itself, or under R.F.R.A. (42 U.S.C. §2000bb), defense counsel submit that a religious motivation was sufficiently demonstrated. See *Jolly v. Coughlin*, 76 F.3d 468 (2d Cir. 1996); *Haff v. Cooke*, 923 F.Supp. 1104 (E.D. Wis. 1996); *Muslim v. Frame*, 891 F.Supp. 226 (E.D.Pa. 1995), and 897 F.Supp. 215 (E.D.Pa. 1995); and *Jesus Center v. Farmington Hills Zoning Board of Appeals*, 544 N.W.2d 698 (Mich. App. 1996).

Since it is now apparent that this court has revisited the threshold question of religious motivation, defense counsel respectfully request a rehearing, so that this issue can be fully briefed.[1]

---

[1] As far as respondent Wolfe is affected, the court's ruling that there was no religious motivation as a matter of law enabled the court to dispense with all the free exercise and evidentiary issues which had been raised. (See Footnote 12 in the Opinion, and Section II.B. in the Opinion.) It is certainly true that free exercise protection is only triggered if there is some basis for arguing that the conduct in question was religiously motivated. Therefore, in the absence of a rehearing, the court's ruling is dispositive to free exercise issues, unless overturned by the United States Supreme Court. However, the evidentiary issues may also bear on the Establishment Clause issue. Based on earlier rulings by this court, the Court of appeals held that

With respect to the verdict form issue, defense counsel note that the potential duplication of damages would have been avoided if the plaintiffs has been required to make an election of remedies. Defense counsel proceeded with an understanding that an election of remedies would be required, but the trial court declined. That accounts for the sequence of events. *If* the trial court refused to require an election of remedies, the verdict forms would then be erroneous. Therefore, there was no waiver of this issue.

CONCLUSION

This Petition for Rehearing is filed primarily to assure that recourse to the United States Supreme Court on certiorari review is preserved. However, respondent Wolfe respectfully requests that this court grant a rehearing to reconsider the points noted above.

---

there was no Establishment Clause issue, and this court denied certiorari on that issue. If and when a petition for certiorari is filed with the United States Supreme Court, it will include the Establishment Clause issue, including the issue of whether the substance of these causes of action and the evidence offered in support of the causes of action violate the Establishment Clause, by creating government regulation of the conduct of clergymen and religious institutions not in spite of their status as such, or without regard for their status as such, but *because* of their status as such.

Respectfully submitted

HIBSCHWEILER & JOHNSON

By _____

James D. Johnson, Reg. No. 9035
Sheila E. Barthel, Reg. No. 21310
Attorneys for Respondent/
cross-petitioner Homer Wolfe
2696 South Colorado Blvd., Suite 595
Denver, Colorado 80222
(303) 692-0900

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing Respondent Wolfe's Petition for Rehearing have been served on counsel of record this 6th day of January, 1997, by placing same in the United States mail, postage prepaid, addressed as follows:

Ms. Joyce Seelen
Holland, Seelen & Pagliuca
One Norwest Center, Suite 2530
Denver, Colorado 80203

Mr. Neil Quigley
Quigley & Bruce
1010 Cherry Tower
950 South Cherry Street
Denver, Colorado 80222

APPENDIX W

Colorado Jury Instructions 2d (Civil)

Wills

31:16 FIDUCIARY RELATIONSHIP – DEFINED

A fiduciary relationship exists whenever a person in the position of a *(insert the most appropriate word or words, e.g., guardian, trustee, executor, agent, conservator, administrator, partner, joint venturer, etc.)* **has a legal power to affect the interests of another which have been entrusted to him. Such person is under a duty to deal with those interests with utmost good faith and solely for the benefit of the other.**

Notes on Use

This instruction should be used in conjunction with Instruction 31:14 and such other instructions, as for example Instruction 19:5, when a definition of "fiduciary relationship" is required.

This instruction sets out the technical definition of a fiduciary. In some situations (see, *e.g.*, cases cited in Source and Authority to Instruction 31:15), a fiduciary may also be in a confidential relationship as defined in Instruction 31:15. In such situations, that Instruction should be given in lieu of, or in conjunction with, this instruction, depending on the circumstances of the particular case.

Source and Authority

This instruction is based on RESTATEMENT 2d, TRUSTS § 2, Comment b (1959) and McKinney v. Christmas, 143 Colo. 361, 353 P.2d 373 (1960) (real estate agent); Midwest Mutual, Inc. v. Heald, 106 Colo. 552, 108 P.2d 535 (1940) (attorney); and Mountain States Beet Growers Marketing Ass'n v. Monroe, 84 Colo. 300, 269 P. 886 (1928) (trustee).

APPENDIX X

Colorado Jury Instructions 3d (Civil)

CHAPTER 26. BREACH OF FIDUCIARY DUTY

26:1 ELEMENTS OF LIABILITY

In order for the plaintiff, (*name*), to recover from the defendant, (*name*), on (his) (her) claim of breach of fiduciary duty, you must find that all of the following have been proved:

1. The defendant was acting as a fiduciary of the plaintiff with respect to (*insert appropriate description of the subject matter, e.g., "sale of plaintiff's house"*);

2. *The defendant breached a fiduciary duty to the plaintiff;*

3. *The plaintiff incurred (injuries) (damages) (losses); and*

4. *The defendant's breach of fiduciary duty was a cause of the plaintiff's (injuries) (damages) (losses).*

If you find that any one or more of these (*number*) propositions has not been proved by a preponderance of the evidence, then your verdict must be for the defendant.

On the other hand, if you find that all of these (*number*) propositions have been proved by a preponderance of the evidence, then your verdict must be for the plaintiff (unless you also find that the defendant's affirmative defense of [*insert any affirmative defense that would be a complete defense to the plaintiff's claims*] has been proved by a preponderance of the evidence, in

which event, your verdict must be for the defendant).

Notes on Use

Omit any numbered paragraph the facts of which are not in dispute.

If there is a dispute as to whether the defendant was acting as a fiduciary of the plaintiff, Instruction 26:2A or 26:2B should be given with this instruction together with any additional instructions that may be required, *e.g.*, Instruction 7:3, defining "agent" and "principal". If there is no such dispute, the first numbered paragraph should be omitted and only the first sentence of Instruction 26:2A should be given.

For a discussion as to when the court may, in effect, direct a verdict as to the existence of a fiduciary relationship and the subject matter of such a relationship, see Paine, Webber, Jackson & Curtis, Inc., v. Adams, 718 P.2d 508, at 518-19 (Colo. 1986).

Whenever this instruction is used, Instruction 26:3, advising the jury as to the specific duty or duties of a fiduciary, must also be given.

Appropriate instructions defining other terms used in this instruction must also be given, *e.g.*, an instruction or instructions relating to causation. See Instructions 9:26-9:30.

Use whichever parenthesized words are appropriate.

If the defendant has put no affirmative defense in issue or there is insufficient evidence to support a

defense, the parenthesized portion of the last paragraph should be omitted.

Though mitigation of damages is an affirmative defense (see Instruction 5:2), only rarely, if ever, when established will it be a complete defense. For this reason, mitigation should not be identified as an affirmative defense in the concluding paragraph of this instruction. Instead, if supported by sufficient evidence, Instruction 5:2 should be given along with the actual damages instruction appropriate to the claim and the evidence in the case.

A fiduciary duty may arise out of a confidential relationship. Rubenstein v. South Denver Nat'l Bank, 762 P.2d 755 (Colo. App. 1988) (*cert. den.*); Dolton v. Capitol Fed. Sav. & Loan Ass'n, 642 P.2d 21 (Colo. App. 1981). However, the existence of a confidential relationship, without more, is insufficient to establish a fiduciary duty. Bock v. Brody, 870 P.2d 530 (Colo. App. 1993), *aff'd in part and rev'd in part on other grounds,* Brody v. Bock, 897 P.2d 769 (Colo. 1995); First Nat'l Bank v. Theos, 794 P.2d 1055 (Colo. App. 1990) (*cert. den.*). Moreover, under Colorado law, there is no separate tort for breach of a confidential relationship. Bock v. Brody, *supra,* Todd Holding Co. v. Super Valu Stores, Inc., 874 P.2d 402 (Colo. App. 1993). To establish the existence of a fiduciary duty arising out of a confidential relationship, it must be shown that: (1) the plaintiff justifiably reposed a special trust or confidence in the defendant; (2) the defendant either invited, ostensibly accepted or acquiesced in the reposing of such trust; and (3) the defendant assumed a duty to act for the benefit of or in the best interests of the plaintiff with respect to the subject matter of the trust. First Nat'l Bank

v. Theos, *supra*. See Crystal Homes, Inc. v. Radetsky, 895 P.2d 1170 (Colo. App. 1995); Jarnagin v. Busby, Inc., 867 P.2d 63 (Colo. App. 1993).

If plaintiff is alleging the existence of a fiduciary duty arising out of a confidential relationship, Instruction 26:2B should be given illegible instruction. See also Instruction 34:15 defining "confiden illegible.

This instruction does not apply to claims for relief that are equitable rather than legal. *Compare* Kaitz v. Dist. Court, 650 P.2d 553 (Colo. 1982) *with* Paine, Webber, Jackson & Curtis, Inc. v. Adams, 718 P.2d 508, at 514 n.5 (Colo. 1986). See also Mahoney Marketing Corp. v. Sentry Builders of Colorado, Inc., 697 P.2d 1139, 1140 (Colo.App. 1985) ("Although fiduciary obligations are equitable in nature, the remedies [for breach] are generally at law.").

Because an action for damages for breach of a duty not to disclose confidential information lies in tort, and is legal rather than equitable, it will support a claim for punitive damages. Rubenstein v. South Denver Nat'l Bank, 762 P.2d 755 (Colo.App. 1988); Virdanco, Inc. v. MTS Int'l, 820 P.2d 352 (Colo. App. 1991) (where primary purpose of action for breach of fiduciary duty was to recover compensatory damages, such action was primarily legal and, therefore, exemplary damages were recoverable even though plaintiff also sought equitable remedy of accounting).

For a discussion of the elements necessary to establish the tort of aiding and abetting a breach of a fiduciary duty, see Holmes v. Young, 885 P.2d 305 (Colo. App. 1994) (*cert. den.*)

Source and Authority

This instruction is based on Rupert v. Clayton Brokerage Co. of St. Louis, 737 P.2d 1106 (Colo. 1987); Paine, Webber, Jackson & Curtis, Inc. v. Adams, *supra*; Kunz v. Warren, 725 P.2d 794 (Colo.App. 1986); Brunner v. Horton, 702 P.2d 283 (Colo.App. 1985); Mahoney Marketing Corp. v. Sentry Builders of Colorado, Inc., *supra*. See also Destefano v. Grabriam, 763 P.2d 275, 284, 289 (Colo. 1988); Bithell v. Western Care Corp., 762 P.2d 708 (Colo.App. 1988) (*cert. den.*); Graphic Directions, Inc. v. Bush, *supra*.

26:2A FIDUCIARY RELATIONSHIP – DEFINED (formerly 26:2)

A fiduciary relationship exists whenever one person is entrusted to act for the benefit of or in the interests of another and has the legal (power) (authority) to do so.

If you find that the defendant, (*name*), was acting as (a) (an) (*insert appropriate description, e.g., "attorney", "partner", "joint venturer", "agent", etc.*) of the plaintiff, (*name*), with respect to (*insert appropriate description of subject matter, e.g., "sale of plaintiff's house"*), then you are instructed that the defendant was acting as a fiduciary of the plaintiff, (*name*), with respect to (*insert appropriate description of subject matter*).

Notes on Use

When, based on undisputed facts, the court determines as a matter of law that the defendant was acting as a fiduciary for the plaintiff with respect to the subject matter of the suit, the jury should also be instructed that the court has determined that a fiduciary relationship existed between the parties. However, when the alleged relationship between the parties, if proven, would establish the existence of a fiduciary relationship as a matter of law, but the facts giving rise to such a relationship are in dispute, then the second paragraph of this instruction should also be given. Depending on the nature of the fiduciary relationship alleged and the particular facts in dispute, this instruction may have to be appropriately modified.

If plaintiff is claiming that the fiduciary duty arose out of a confidential relationship and there is sufficient evidence to support such a claim then, Instruction 26:2B rather than this instruction should be used.

Source and Authority

This instruction is based on RESTATEMENT (2D,) OF TRUSTS § 2, Comment b (1959); McKinney v. Christmas, 143 Colo. 361, 353 P.2d 373 (1960) (real estate agent); Midwest Mutual, Inc. v. Heald, 106 Colo. 552, 108 P.2d 535 (1940) (attorney); Mountain States Beet Growers Marketing Ass'n v. Monroe, 84 Colo. 300, 269 P. 886 (1928) (trustee). See also Howard v. Hester, 139 Colo. 255, 338 P.2d 106 (1959) (attorney and real estate agent); Hart v. Colorado Real Estate Comm'n, 702 P.2d 763 (Colo. App.

1985) (agent as a fiduciary); Brunner v. Horton, 702 P.2d 283 (Colo. App. 1985) (same).

26:3 DUTIES OF FIDUCIARY – DEFINED

If you find that the defendant, (*name*) was acting as a fiduciary of the plaintiff, (*name*), with respect to (*insert appropriate description of subject matter, e.g., sale of plaintiff's house*), then you are instructed that the defendant owed the following (duty) (duties) to the plaintiff:

(*Insert as required, in separately numbered paragraphs if there are more than one, an appropriate description of the duty or duties which would be*

Notes on Use

This instruction should be used in conjunction with Instruction 26:1 to describe the fiduciary duty or duties the plaintiff claims the defendant breached and the breach of which, under the applicable law and evidence in the case, would be appropriate for the jury to determine. The court determines as a matter of law the nature of the specific duties owed by the fiduciary. DeBosse v. Bear Valley Church of Christ, 890 P.2d 214, 225 (Colo. App. 1994) (*cert. granted* 1995) (citing instruction).

Use whichever parenthesized words in the first paragraph are appropriate.

Illustrative insertions for the second paragraph are the duty of an agent "to disclose to the principal all facts

relative to the subject matter of the agency which might reasonably affect the principal's decision," Kunz v. Warren, 725 P.2d 794 (Colo.App. 1986); the duty of a trustee "to seek to obtain the best price obtainable for the trust property when selling it," Murphy v. Central Bank & Trust Co., 699 P.2d 13 (Colo.App. 1985); and the duty of an agent "not to sell products of his principal on credit without first making reasonable inquiry as to the financial circumstances of the buyer," Brunner v. Horton, 702 P.2d 283 (Colo.App. 1985). Van Schaack Holdings, Ltd. v. Van Schaack, 867 P.2d 892 (Colo. 1994) (fiduciary duty of officer or director of closely held corporation when purchasing stock of minority shareholder); Vento v. Colorado Nat'l Bank-Pueblo, 907 P.2d 642 (Colo. App. 1995) (*cert. den.*) (duties of trustee to beneficiaries); River Management Corp. v. Lodge Props., Inc., 829 P.2d 398 (Colo. App. 1991) (majority shareholders and directors in a close corporation owe the highest degree of fidelity and confidence to minority shareholders and cannot exercise corporate power in bad faith or for their own advantage). See also Rifkin v. Platt, 824 P.2d 32 (Colo. App. 1991) (director owes fiduciary duty to corporation but has broad discretion in making decisions for corporation and cannot be held liable for legitimate business decisions made in good faith unless such decisions were made for director's own personal interest or advantage); Marshall v. Grauberger, 796 P.2d 34 (Colo. App. 1990) (*cert. den.*) (fiduciary duties of husband who had discretionary control of former wife's shares of stock in corporation required him to act with prudence, reasonableness and equity with respect to sale of such shares, to seek the best price possible for such shares, and not to allow his own

motives to interfere with the discharge of those duties). For other cases describing various duties, see Source and Authority below.

For several illustrative common-law duties an agent may owe his or her principal, see RESTATEMENT 2d, AGENCY §§ 377-398 and 422-431 (1958). See also Life Care Ctrs. of Am., Inc. v. East Hampden Assocs. Ltd. Partnership, 903 P.2d 1180 (Colo. App. 1995) (*cert. den.*) (duties of agent); Winston Fin. Group, Inc. v. Fults Management, Inc., 872 P. 2d 1356 (Colo. App. 1994) (unless parties agree otherwise, customs normally found in agency relationship determine scope of agent's duties).

A fiduciary duty may be imposed by statute. Alexander Co. v. Packard, 754 P.2d 780 (Colo.App. 1988) (applying § 38-22-127, C.R.S. (repl.v. 1982). Another statutory example is § 15-1-304, C.R.S. (repl.v. 1987) (standard for making investments). A fiduciary duty may also arise out of a confidential relationship. Alexander Co. v. Packard, *supra*. See also Buder v. Sartore, 774 P.2d 1383 (Colo. 1989) (discussing and comparing three statutory standards for making investments).

The existence of a fiduciary relationship between a personal representative and the beneficiaries of an estate does not relieve the personal representative of contractual obligations of the decedent. Colorado Nat'l Bank v. Friedman, 846 P.2d 159 (Colo. 1993).

Source and Authority

This instruction is based on McKinney v. Christmas, 143 Colo. 361, 353 P.2d 373 (1960); Brunner v. Horton,

supra; RESTATEMENT 2d, AGENCY § 13, Comment a (1958). See also Jet Courier Service, Inc. v. Mulei, 771 P.2d 486 (Colo. 1989) (discussing various aspects of an employee's duty of loyalty when employee preparing to leave employer and establish a competing business); Steeby v. Fial, 765 P.2d 1081 (Colo.App. 1988) (fiduciary duties between partners continue until partnership assets have been divided and liabilities satisfied); T-A-L-L Inc. v. Moore & Co., 765 P.2d 1039 (Colo.App. 1988), *aff'd with modification*, 792 P.2d 794 (Colo. 1990) (duty of real estate agent to disclose facts to principal and duty not to disclose confidential information to third persons); Rubenstein v. South Denver Nat'l Bank, 762 P.2d 755 (Colo.App. 1988) (discusses scope of duty of bank not to disclose financial condition of customers and depositors); Collie v. Becknell, 762 P.2d 727 (Colo.App. 1988) (*cert.den.*) (duties of corporate officers not to usurp corporate opportunities or divert corporate property to own benefit); Rupert v. Clayton Brokerage Company of St. Louis, Inc., 737 P.2d 1106, 1109 (Colo. 1987) (discusses various duties owed to a customer by an investment broker when handling a discretionary account as a fiduciary); Roeschlein v. Watkins, 686 P.2d 1347, 1350 (Colo.App. 1984) (*cert.den.*) ("A general partner, in winding up partnership affairs, owes his limited partners a common law fiduciary duty of good faith, sound business judgment, candor, forthrightness, and fairness."); Moses v. Diocese of Colo., 863 P.2d 310 (Colo. 1993), *cert. den.*, ___ U.S. ___, 114 S.Ct. 2153, 128 L. Ed. 2d 880, (1994) (once a member of the clergy accepts the parishioner's trust and accepts the role of counselor, a duty exists to act with the utmost good faith for the benefit of the parishioner); Destefano v. Grabrian, 763

P.2d 275 (Colo. 1988) (priest acting as a marriage counselor to parishioner had duty to act "with utmost good faith and solely for benefit" of parishioner); Graphic Directions, Inc. v. Bush, 862 P.2d 1020 (Colo. App. 1993) (cert. den.) (employee's duty of loyalty); Cole v. Jennings, 847 P.2d 200 (Colo. App. 1992) (*cert. den.* 1993) (real estate broker); Estate of McCart, 847 P.2d 184 (Colo. App. 1992) (*cert. den.* 1993) (trustee); McCrea & Co. Auctioneers, Inc. v. Dwyer Auto Body, 799 P.2d 394 (Colo. App. 1989) (joint venturers owe each other fiduciary duties of loyalty and of fair, open and honest disclosure); Tucker v. Ellbogen, 793 P.2d 592 (Colo. App. 1989) (*cert. den.*) (managing partner has a fiduciary duty to wind up partnership affairs as expeditiously as possible so as not to cause waste); Koontz v. Rosener, 787 P.2d 192, 195 (Colo. App. 1989) (while an employee may have a privilege to prepare or make arrangements to compete with the employer prior to leaving that employment, the nature of those preparations is significant in determining whether the employee may have breached his or her duty of loyalty to the employer).

For what, on the other hand, does not constitute a fiduciary duty, see Schenck v. Van Ningen, 719 P.2d 1100 (Colo.App. 1986) (real estate agent not under a duty to discover for benefit of purchaser that county intended to condemn part of the property).

APPENDIX Y

26:2B FIDUCIARY RELATIONSHIP ARISING OUT OF A CONFIDENTIAL RELATIONSHIP – ELEMENTS (NEW INSTRUCTION)

In order to find that the defendant, (*name*), was acting as a fiduciary of the plaintiff, (*name*), with respect to (*insert appropriate description of subject matter, e.g., sale of plaintiff's house*) you must find that all of the following have been proved:

1. The plaintiff placed (trust) (or) (confidence) in the defendant with respect to (*insert appropriate description of subject matter*);

2. The plaintiff acted reasonably in placing such (trust) (or) (confidence) in the defendant;

3. The plaintiff's trust) (or) (confidence) was (accepted) (invited) (acquiesced in) by the defendant; and

4. The defendant (agreed) (undertook) (purported) to act for the benefit of the plaintiff with respect to (*insert appropriate description of subject matter*).

Notes on Use

When, as a matter of law, the relationship between the plaintiff and the defendant with respect to the subject matter is a fiduciary one, the first sentence of Instruction 26:2A, rather than this instruction, should be used. Also, Instruction 26:2A should be used, rather than this instruction, when the claimed fiduciary duty is based on a relationship that is recognized, as a matter of law, as being a fiduciary relationship, such as exists between

agent and principal, partners, joint venturers, attorney and client, etc. See, generally, Chapter 7 of these instructions.

In all cases involving a fiduciary relationship arising out of a confidential relationship, the four elements of this instruction must be proven by the plaintiff. However, because fiduciary relationships have been found to arise in diverse situations, the court may need to consider the adequacy of this instruction in light of the particular facts of the case. For example, a fiduciary duty has been found where one party occupied a superior position over the other, and thus, was in a position to influence or affect the interests of the other. Moses v. Diocese, of Colo., 863 P. 2d 310 (Colo. 1993) *cert. den.*, ___ U.S. ___, 114 S.Ct. 2153, 128 L.Ed. 2d 880 (1994). A fiduciary duty has been found where one person has practical control over the affairs of another. Paine, Webber, Jackson & Curtis v. Adams, 718 P. 2d 508 (Colo. 1986). A fiduciary duty may arise from a business or confidential relationship which compels or induces one party to relax the care and vigilance one would ordinarily exercise in dealing with a stranger. Dolton v. Capitol Fed. Sav. & Loan Ass'n, 642 P.2d 21 (Colo. App. 1981). A fiduciary relationship can arise out of a relationship of blood, business, friendship or other association. Moses v. Diocese of Colo., *supra*. Accordingly, although the Committee believes that elements one through four of this instruction are required to establish the existence of a fiduciary duty arising out of a confidential relationship in all cases, nevertheless, this instruction may need to be appropriately modified or supplemented to better reflect the law applicable to specific factual situations.

A prerequisite to finding a fiduciary duty is the existence of a fiduciary relationship. Moses v. Diocese of Colo., 863 P. 2d 310, 321 *cert. den.*, ___ U.S. ___, 114 S.Ct. 2153, 128 L.Ed. 2d 880 (1994) (Colo. 1993), *cert. den.*, ___ U.S. ___, 114 S. Ct. 2153, 128 L. Ed. 2d 880, (1994) (record supported jury's determination that a fiduciary relationship existed between bishop and parishioner where there was evidence that bishop occupied superior position over parishioner, was able to exert substantial influence over parishioner and assumed a duty to act in the best interests of the parishioner).

For other cases in which the existence of a fiduciary relationship was in issue, see Destefano v. Grabrian, 763 P. 2d 275 (Colo. 1988) (priest acting as a marriage counselor had a fiduciary relationship to both husband and wife with respect to their marital relationship); Paine, Weber, Jackson & Curtis v. Adams, 718 P. 2d 508 (Colo. 1986) (stockbroker who had practical control over customer's account had fiduciary duty to customer with respect to handling account); Johnston v. CIGNA Corp., 916 P.2d 643 (Colo.App. 1996) (generally, investment adviser owes fiduciary duty to customers); Emenyonu v. State Farm Fire & Cas. Co., 885 P. 2d 320 (Colo. App. 1994) (contractual relationship between an insurer and its insured does not give rise to a fiduciary relationship with respect to first party disputes); Wells Fargo Realty Advisers Funding, Inc. v. Uioli, Inc., 872 P. 2d 1359 (Colo. App. 1994) (no fiduciary relationship between borrower and lender where borrower did not repose special trust in lender or relax care and vigilance that borrower would have ordinarily exercised); Bock v. Brody, 870 P.2d 530 (Colo. App. 1983), *aff'd in part and rev'd in part on other*

grounds, Brody v. Bock, 897 P.2d 769 (Colo. 1995) (evidence of close business and personal relationship, without more, is insufficient to establish a fiduciary relationship); Jarnigan v. Busby, Inc., 867 P. 2d 63 (Colo. App. 1993) (no fiduciary relationship between parties where there was no evidence that plaintiff reasonably reposed trust and confidence in defendant); Graphic Directions, Inc. v. Bush, 862 P. 2d 1020 (Colo. App. 1993) (*cert. den.*) (art director of graphics business owed fiduciary duty to employer); Nicholson v. Ash, 800 P. 2d 1352 (Colo. App. 1990) (evidence was insufficient to establish a fiduciary relationship where no confidential relationship existed between the parties prior to the date of the business transaction that gave rise to the claim); First Nat'l Bank v. Theos, 794 P. 2d 1055 (Colo. App. 1990) (*cert. den.*) (trial court erred in failing to instruct jury that to establish fiduciary relationship between bank and borrower, borrower had to show that he justifiably reposed a special trust or confidence in bank to act in borrower's best interest; that bank either invited, ostensibly accepted or acquiesced in such trust; and that bank assumed a duty to act in borrower's interest with respect to subject matter of trust); Rubenstein v. South Denver Bank, 762 P. 2d 755 (Colo. App. 1988) (*cert. den.*) (trial court erred in entering summary judgment dismissing plaintiff's claim against bank for breach of fiduciary duty since there were controverted issues of material fact regarding the existence of such relationship); Dolton v. Capitol Fed. Sav. & Loan Ass'n, 642 P. 2d 21 (Colo. App. 1981) (same); Breedon v. Dailey, 40 Colo. App. 70, 574 P. 2d 508 (1978) (where employment agreement gave the defendant the power to make financial commitments in unlimited amounts on

plaintiff's behalf and without prior approval, a fiduciary relationship existed between the parties as a matter of law). See also Circle T Corp. v. Deerfield, 166 Colo. 238, 444 P. 2d 404 (1968); Alexander v. Packard, 754 P. 2d 780 (Colo. App. 1988); Meyer v. Schwartz, 638 P. 2d 821 (Colo. App. 1981) (*cert. den*).

Source and Authority

See authorities cited above.

APPENDIX Z

Colorado Jury Instruction 3d (Civil)

Emotional Distress

23:1 ELEMENTS OF LIABILITY

In order for the plaintiff, *(name)*, to recover from the defendant, *(name)*, on (his) (her) claim of extreme and outrageous conduct, you must find all of the following have been proved:

1. The defendant engaged in extreme and outrageous conduct;

2. The defendant engaged in the conduct recklessly or with the intent of causing the plaintiff severe emotional distress, and

3. The plaintiff incurred severe emotional distress which was caused by the defendant's conduct.

If you find that any one or more of these *(number)* propositions has not been proved by a preponderance of the evidence, then your verdict must be for the defendant.

On the other hand, if you find that all of these *(number)* propositions have been proved by a preponderance of the evidence, then your verdict must be for the plaintiff (unless you should also find that the defendant's affirmative defense of *[insert any affirmative defense that would be a complete defense to the plaintiff's claim]* has been proved by a preponderance of the evidence, in which event, your verdict must be for the defendant).

23:2 EXTREME AND OUTRAGEOUS CONDUCT – DEFINED

Extreme and outrageous conduct is conduct which is so outrageous in character, and so

extreme in degree, that a reasonable member of the community would regard the conduct as atrocious, going beyond all possible bounds of decency and utterly intolerable in a civilized community. Such outrageous conduct occurs when knowledge of all the facts by a reasonable member of the community would arouse that person's resentment against the defendant, and lead that person to conclude that the conduct was extreme and outrageous.

(A series of acts may constitute outrageous conduct, even though any one of the acts might be considered only an isolated unkindness or insult.) (A simple act of unkindness or insult, standing alone, does not constitute outrageous conduct. However, a single incident may constitute outrageous conduct if the incident would be so regarded by a reasonable member of the community.)

(The extreme and outrageous character of conduct may arise from a person's knowledge that another is peculiarly susceptible to emotional distress because of some physical or mental condition or peculiarity. To proceed in the face of such knowledge may make one's conduct extreme and outrageous, although the same conduct in the absense of such knowledge would not be so regarded. The fact, however, that a person knows that another person will regard the conduct as insulting or will have his or her feelings hurt does not alone make conduct extreme and outrageous.)

APPENDIX AA

AMENDMENTS TO THE CONSTITUTION OF THE UNITED STATES OF AMERICA

ARTICLES IN ADDITION TO, AND AMENDMENT OF, THE CONSTITUTION OF THE UNITED STATES OF AMERICA, PROPOSED BY CONGRESS, AND RATIFIED BY THE SEVERAL STATES, PURSUANT TO THE FIFTH ARTICLE OF THE ORIGINAL CONSTITUTION[1]

AMENDMENT [1.]

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

* * *

AMENDMENT XIV.

SECTION. 1. All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; or shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

SECTION. 2. Representatives shall be apportioned among the several States according to their respective

numbers, counting the whole number of persons in each State, excluding Indians not taxed. But when the right to vote at any election for the choice of electors for President and Vice President of the United States, Representatives in Congress, the Executive and Judicial officers of a State, or the members of the Legislature thereof, is denied to any of the male inhabitants of such State, being twenty-one years of age, and citizens of the United States, or in any way abridged, except for participation in rebellion, or other crime, the basis of representation therin shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such State.

SECTION. 3. No person shall be a Senator or Representative in Congress, or elector of President and Vice President, or hold any office, civil or military, under the United States, or under any State, who, having previously taken an oath, as a member of Congress, or as an officer of the United States, or as a member of any State legislature, or as an executive or judicial officer of any State, to support the Constitution of the United States, shall have engaged in insurrection or rebellion against the same, or given aid or comfort to the enemies thereof. But Congress may by a vote of two-thirds of each House, remove such disability.

SECTION. 4. The validity of the public debt of the United States, authorized by law, including debts incurred for payment of pensions and bounties for services in suppressing insurrection or rebellion, shall not be questioned. But neither the United States nor any State shall assume or pay any debt or obligation incurred in aid of insurrection or rebellion against the United States, or

any claim for the loss or emancipation of any slave; but all such debts, obligations and claims shall be held illegal and void.

SECTION. 5. The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.

* * *

APPENDIX BB

PL 103-141, November 16, 1993, 107 Stat 1488
(cite as: 107 Stat 1488)

UNITED STATES PUBLIC LAWS
103rd Congress – First Session
Convening January 5, 1993
CPR. (C) WEST 1993 No. Claim to Orig. Govt. Works

Additions and Deletions are not identified in this document. For Legislative History of Act, see LH database or Report for this Public Law in U.S.C.C. & A.N. Legislative History section.

PL 103-141 (HR 1308)
November 16, 1993
RELIGIOUS FREEDOM RESTORATION ACT OF 1993

An Act to protect the free exercise of religion.

So it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

< 42 USCA s 2000bb NOTE >

SECTION 1. SHORT TITLE

This Act may be cited as the "Religious Freedom Restoration Act of 1993"

< 42 USCA s 2000bb >

SEC. 2. CONGRESSIONAL FINDINGS AND DECLARATION OF PURPOSES.

(a) FINDINGS. – The Congress finds that –

(1) the framers of the Constitution, recognizing free exercise of religion as an unalienable right, secured its protection in the First Amendment to the Constitution;

(2) laws "neutral" toward religion may burden religious exercise as surely as laws intended to interfere with religious exercise;

(3) governments should not substantially burden religious exercise without compelling justification;

(4) in Employment Division v. Smith, 494 U.S. 872 (1990) the Supreme Court virtually eliminated the requirement that the government justify burdens on religious exercise imposed by laws neutral toward religion; and

(5) the compelling interest test as set forth in prior Federal court rulings as a workable test for striking sensible balances between religious liberty and competing prior governmental interests.

(b) PURPOSES. – The purposes of this Act are –

(1) to restore the compelling interest test as set forth in Sherbert v. Verner, 374 U.S. 398 (1963) and Wisconsin v. Yoder, 406 U.S. 205 (1972) and to guarantee its application

in all cases where free exercise of religion is substantially burdened; and

(2) to provide a claim or defense to persons whose religious exercise is substantially burdened by government.

< 42 USCA s 2000bb-1 >

SEC. 3. FREE EXERCISE-OF RELIGION PROTECTED.

(a) IN GENERAL. – Government shall not substantially burden a person's exercise of religion even if the burden results from a rule of general applicability, except as provided in subsection (b).

(b) EXCEPTION. – Government may substantially burden a person's exercise of religion only if it demonstrates that application of the burden to the person – *1489

(1) is in furtherance of a compelling governmental interest; and

(2) is the least restrictive means of furthering that compelling governmental interest.

(c) JUDICIAL RELIEF. – A person whose religious exercise has been burdened in violation of this section may assert that violation as a claim or defense in a judicial proceeding and obtain appropriate relief against a government. Standing to assert a claim or defense under this section shall be governed by the general rules of standing under article III of the Constitution.

SEC. 4. ATTORNEYS FEES.

< 42 USCA s 1988 >

(A) JUDICIAL PROCEEDINGS. – Section 722 of the Revised Statutes (42 U.S.C. 1988) is amended by inserting "the Religious Freedom Restoration Act of 1993," before "or title VI of the Civil Rights Act of 1964".

< 5 USCA s 504 >

(b) ADMINISTRATIVE PROCEEDINGS. – Section 504(b)(1)(C) of title 5, United States Code, is amended –

(1) by striking "and" at the end of clause (ii);

(2) by striking the semicolon at the end of clause (iii) and inserting ", and"; and

(3) by inserting "(iv) the Religious Freedom Restoration Act of 1993;" after clause (iii).

< 42 USCA s 2000bb-2 >

SEC. 5. DEFINITIONS.

As used in this Act –

(1) the term "government" includes a branch, department, agency, instrumentality, and official (or other person acting under color of law) of the United States, a State, or a subdivision of a State;

(2) the term "State" includes the District of Columbia, the Commonwealth of Puerto Rico, and each territory and possession of the United States;

(3) the term "demonstrates" means meets the burdens of going forward with the evidence and of persuasion; and

(4) the term "exercise of religion" means the exercise of religion under the First Amendment to the Constitution.

< 42 USCA s 2000bb-3 >

SEC. 6. APPLICABILITY.

(a) IN GENERAL. – This Act applies to all Federal and State law, and the implementation of that law, whether statutory or otherwise, and whether adopted before or after the enactment of this Act.

(b) RULE OF CONSTRUCTION. – Federal statutory law adopted after the date of the enactment of this Act is subject to this Act unless such law explicitly excludes such application by reference to this Act.

(c) RELIGIOUS BELIEF UNAFFECTED. – Nothing in this Act shall be construed to authorize any government to burden any religious belief.

< 42 USCA s 2000bb-4 >

SEC. 7. ESTABLISHMENT CLAUSE UNAFFECTED.

Nothing in this Act shall be construed to affect, interpret, or in any way address that portion of the First Amendment prohibiting laws respecting the establishment of religious (referred to in this section as the "Establishment Clause(). Granting government funding, benefits, or exemptions, to the extent permissible under the Establishment Clause, shall not constitute a violation of this *1490 Act. As used in this section, the term "granting", used with respect to government funding, benefits, or exemptions, does not include the denial of government funding, benefits, or exemptions.

Approved November 16, 1993.

PL 103-141, 1993 HR 1308